LEGAL ASPECTS OF OWNERSHIP AND USE OF ESTUARINE AREAS IN GEORGIA AND SOUTH CAROLINA

by Carroll Leavell

Institute of Government
The University of Georgia

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FOREWORD

This report is part of a study of estuarine law in the Southeast. The project originated as a result of increased awareness of the need for conservation of the estuarine area, particularly in the Southeastern states.

The research for the project is made possible by a matching grant from the United States Office of Water Resources Research and is an extension of previous work done at the Institute of Government in the area of water law.

Although this paper does not purport to answer all legal questions concerning estuarine use, it is hoped that the basic research it provides will be useful in answering many of them and, more importantly, will provide a useful, general background for drafting local, state and multi-state legislative solutions to the many problems presented by the use and preservation of the estuarine area.

Morris W. H. Collins, Jr.
Director

Recognition

I wish to express gratitude for the valuable assistance of R. Russell Berry, Esq., who worked as my research assistant during the course of the preparation of this report.

INTRODUCTION

The estuarine area in Georgia and South Carolina comprises over one million acres. It is regarded as one of the most fragile and critical components of the coastal zone[1] --fragile because harm to the area may be irreversible,[2] and critical because of the implication of the multiple and often conflicting uses to which the area has already been and is being subjected. The estuarine area in a largely unaltered state is vitally important to man and animal because of its extraordinary production of both oxygen and food. Its role in the replenishment of oxygen for the atmosphere has been characterized as perhaps its most important use.[3] The importance of the estuary to fish and shellfish is well documented--an estimated two-thirds of all ocean animals either spend a part of their lives in the estuary of which this segment is a substantial part, or feed upon a species that has lived there.[4] Other important uses are also served by the estuarine ecosystem. It is estimated that over twenty million people go boating for recreational purposes in these coastal waters.[5] Aesthetic considerations add value to property bordering this coastal area.

All of the vital roles played by estuarine areas are threatened by physical alteration--such as dredging, filling, diking, damming.[6] These activities are occurring at an ever increasing rate. A loss of seven

percent of the nation's important estuarine area in the last twenty years has resulted from filling by housing developers.[7] Atlantic coast navigation projects--such as the Intracoastal Waterway--have been more destructive of the marine habitat than any other type of water development project.[8] Recent calculations indicate that "[a]t current rates of destruction, about one acre of marshland and over an acre of shoal water is destroyed every hour."[9] Such a course of events can only be explained in terms of an absence of appreciation of the extent of our dependence upon the estuarine system.

Recently, public attention has begun to focus on this area, and to show increasing concern for the ecological, recreational, aesthetic and economic values which are at stake. The need to develop a comprehensive program with a desirable balance between public and private roles, and consistent with preservation of the quality of the estuarine ecosystem, is being increasingly recognized. For such planning to be effective it must take account of and be realistically related to the existing legal framework of ownership and control of the estuarine area. Planning for such a goal is hampered by the absence of an adequate exposition of this legal framework. The purpose of this study is to fill this need by identifying and providing an understanding of these legal doctrines as they have developed in Georgia and in South Carolina.

The estuarine complex to be studied contains both land and water areas. The term "estuary" has many definitions, depending upon the

frame of reference or scientific base for classification.[10] From a physical viewpoint, the estuary has been usefully defined as a semi-enclosed coastal body of water having a free connection with the open sea, within which there is measurable dilution of sea water by fresh water from land drainage.[11] In addition, tidal action strongly affects the estuary.[12] Thus, in physical terms, the upper or inland limits of the area of the estuary may be defined in terms of tide elevation from sea level[13] and the lower limits delineated by geomorphological or geological features.[14] Extending landward this would include coastal marshes and tidal creeks, and in a seaward direction would extend beyond the ordinary low-water mark.

Utilizing this definition as a framework, the various legal doctrines under which both public and private interests in this area have been and are being acquired can be identified, explained and related to it. As might be expected where there has been little comprehension of the great importance of the area, private utilization of its principal components--the waters, the foreshore areas (that is, those properties lying between high and low-water mark), and the underlying beds--and the conflicts which resulted, have shaped much of the law related to it. State law, and particularly the common law, as it was received and has evolved in the respective states, has been the main source of these legal rules and this report is, for the most part, a study of the development of state doctrines.

The outline to be followed in studying the law of each state focuses upon "ownership" of land in each of the following categories: the foreshore of estuarine areas; beds of tidal waterways and beds of the marginal sea less than three geographical miles from a state "coast line"; and upon rights in waters[15] in the related estuarine categories: foreshore waters, waters of navigable and non-navigable streams, and marginal seawaters within the three geographical mile limit. The outline then considers in a separate part special legal doctrines of particular significance to estuaries such as "accretion," "erosion," "adverse possession" and "dedication."

Finally, and dealt with more briefly, is control by state regulation. Whereas the states until quite recently took a passive role in the use and development of these areas, there is now an increasingly evident legislative interest in public control of the area.

HISTORICAL BACKGROUND

Any examination of ownership rights in these states must begin with a discussion of the English common law because that legal system came with the English to the colonies of South Carolina and Georgia, and, following the Revolution, was formally adopted and made a part of the law of both states.

The English common law concerning the three areas in which we are particulary interested--tidal waters, beds, and foreshore areas--derived from two essentially contradictory sources--the Roman law doctrine of res commune, which presupposed that certain natural resources such as air, water, the sea and foreshore are owned in common by all, and the early common law property concept which recognized private ownership in certain areas, but with the individual's ownership rights limited by recognizing a right of use by others for certain public purposes such as navigation and fishing.[16] The tendency on the part of judges to draw on these differing legal traditions, and the general confusion which this brought into the area of the law may be explained at least partially by the nature of what is sought to be controlled--involving, on one hand, a constantly moving and changing body of water which has great importance to the community and the public, and, on the other hand, an

underlying bed of land which is usually stable, and in that sense similar to dry land, yet accessible only for special uses.

Although the British Isles as part of the domain of the Roman Empire had been subject to Roman law with its doctrine of res commune, the decentralization of control following the Roman decline found effective control only in local lords who applied their own local laws. Following the Norman Conquest there began the development of a regular, unified system of English law. The treatise writers of this early period who had a major impact on the development of English law, such as Bracton, who wrote during the mid-thirteenth century, and later Fleata and Britton, relied upon the Roman law notion of res commune in discussing rights in waters, the sea and foreshore areas.[17] Without apparent regard for the latter concepts, there was developing at the same time an English system of landholding under what has come to be known as "feudalism," a system of property ownership in which, at least theoretically, all land was held directly or indirectly by grant from the King. And as pointed out by the commentators, "it appears that at the time when the land titles in England became vested in private owners, there was no acquaintance with any reason why the titles should not include land under the water as well as dry land."[18]

As the law developed during the one hundred year period from 1568 to 1668, a theory came to be accepted that the King owned all lands washed by the tide. This theory had evolved from two sources--the King

had dominion over the sea and therefore over all of its reaches, and the King was owner of the waste lands of this kingdom,[19] to which was added the assumption, perhaps erroneous, that these areas were ungranted. This theory was current at the time of Queen Elizabeth[20] and when it was later included in Lord Hale's treatise, De Jure Maris, in 1667 it was accepted as an authoritative statement of law.[21] An important implication of the theory was the "presumption" that grant of land adjoining tidal waters did not operate to include adjoining lands covered by the tide unless there were specific words to that effect.[22] The importance of this presumption may be appreciated when one takes into account the number and extent of the grants previously made by the King and affected by the "presumption." While such express alienation was necessary to convey title to land washed by the tides, by way of contrast, a Crown grant of land adjoining non-tidal waters was presumed to operate as conveyance of the adjacent non-tidal beds.

As public interest in waters and underlying beds began to increase, there developed another concept concerning the nature of ownership of certain properties by the King. These he was said to own in a dual capacity--in his proprietary capacity as jus privatum, and in his representative capacity as jus publicum. Though the King's dominion was said to extend over the sea, its inland reaches, the bed and foreshore of tidal areas, it was postulated that the King owned these lands in his capacity as jus publicum, holding them in trust for the people.[23]

Grants of jus publicum land, it was posited, could only have been made subject to those public rights in them.[24] Later it was said that grants of these Crown lands in which this public interest existed could only be made subject to Parliamentary regulations, the first of which was passed in 1702.[25] Thus, despite acknowledgement of a proprietary "ownership in the Crown or in a state or the people as successor to the Crown,"[26] there were at the same time public rights in these areas (the "seas . . . all creeks, arms of the sea, havens, ports and tide-rivers, as far as the reach of the tide")[27] which could not be abrogated.[28]

Under the common law at the time of the colonial settlement and the Revolution, the Crown's jus publicum right to waters and land under them was co-extensive with tidal waters. The limits of this royal property right were determined by the extent of the tide.[29] Watercourses, on the other hand, were conceived of as real property and either pertained to the land or to the sea, and if pertaining to the sea, they were owned by the Crown as a consequence of the recognition of its dominion over "the sea and all its reaches."[30] The jus publicum or trust ownership of tidal areas was not affected by navigability.[31] The latter did, however, determine the right of "easement of passage" by the public, a right which extended not only to tidal waters but also to non-tidal navigable streams.[32] The right of fishery at this time was considered a public right pertaining only to waters having tidal character.[33]

These rights of the public were at times perceived of as in the nature of easements ("a right of passage is an easement") which limited private ownership.[34] While the concept of such an easement in privately owned property is theoretically incompatible with a doctrine of common ownership as it existed in Roman law, in practice each doctrine could be and has been used by common law judges to support the public interest in this area.[35] It is these diverse components which comprise the public ownership claim which has come to be known as the "public trust" doctrine.

Together with these public rights with respect to estuarine areas, which were recognized at the time of colonization, private rights in the same areas were enjoyed by certain individuals, but limited in scope. Though there were few cases dealing with water law decided during the eighteenth century, these decisions, and Blackstone's Commentaries, published during the years 1765 through 1769, furnish some authority for recognizing these rights. Owners of land adjoining bodies of water, tidal or non-tidal, had certain rights not accorded the general public by reason of their adjacency.[36] In general, the upland or "riparian" owner,[37] subject to limitation under certain circumstances, had a "natural" right to an uninterrupted flow of water;[38] provided his use was such as not to damage another;[39] could obtain by prescription a larger right of use than his natural rights;[40] enjoyed a right to accretions;[41] and had a right of access which might include the right to

erect wharves.[42] In addition to these riparian rights in estuarine areas, private rights in estuarine lands which did not conflict with public trust easements, could be obtained by specific grant as already discussed.

The English colonists carried with them the common law of England as far as its application was practical in new surroundings and thus brought to the geographical areas under consideration these theories of public trust and concepts of private rights in lands and waters.[43]

THE GEORGIA LAW

A. Early History of Estuarine Law

The two periods of the colonial history of Georgia--the colony as a trusteeship from 1732-1752, and a royal colony from 1752-1776--furnish little evidence of doctrinal development in the area of estuarine law. The King could not grant either to the Trustees, by virtue of their royal charter, or to the Lords Commissioners, who subsequently managed the royal colonies for the King, any greater powers than he himself held. The Charter of the Trustees,[44] and the later grant of authority to the Lords Commissioners,[45] directed them to make laws not repugnant to English law,[46] but there is no evidence of important legislative or other developments with respect to areas under study which would alter the legal concepts which have been described.[47]

After the American Revolution, the rights of the King and of Parliament vested in the states, subject to rights which were later surrendered to the federal government.[48] In Georgia the General Assembly, in 1778, adopted as its law all provincial law in effect when Georgia became independent, and all the laws of England, "as well statutory as common," not repugnant to the rules and regulations of the Continental Congress or to those of the Assembly itself.[49] In addition,

the Georgia General Assembly by Act, in 1784, accepted as part of its law, except where contrary to the Georgia Constitution, all pre-existing provincial law which was in force in May, 1776, including all English common law and statutes such as were generally in force in the province.[50] The Supreme Court of Georgia in an early decision declared that the common law principles are "obligatory . . . unless contrary to the Constitution, laws, or form of government established in this State."[51] Furthermore, the Georgia Supreme Court, in the case of Johnson v. State, decided in 1902, specifically recognized and reaffirmed the common law concept of "public ownership" of the foreshore areas.[52] The land boundary of this "trust" property was generally considered to be high tide.[53]

Consideration of what restrictions existed in dealing with these publicly held interests was before the Georgia Supreme Court in another early case, Mayor & Aldermen v. State, decided in 1848.[54] This case involved an application for mandamus to compel the appointment of Commissioners, pursuant to the terms of an Act of the legislature, who would fix the waterline of wharves in part of the Savannah River. Judge Lumpkin, in discussing the power of the State to enact legislation regulating navigation where such regulation might obstruct navigation in part of tidal navigable waters, rejected the contention that the public easement for navigation concept required that such public right of use be absolute and not subject to limitation. Navigation might in some cases be

"entirely prevented," as in the case of a bridge where "the passage of vessels of a description, which before had been accustomed to pass" would not be possible even though much care had been taken in building a suitable bridge.[55] Despite having acknowledged the sovereign power to regulate and thus limit the public right, the court examined the Act to determine its effect. Consideration of the full text of the Act revealed that it was drawn with great care to protect the navigation of the river.[56] The court concluded that the legislation was a valid exercise of legislative power which could not be frustrated because the individual officers of the City who sought to challenge it might disagree with the method adopted for improving navigation.[57]

This early case involving estuarine waters declared that the public right of navigation, a traditionally recognized public trust interest, could be regulated by the State, and even partially extinguished, where the needs of navigation required it. But where this public right would be interferred with by governmental action, the court by its conduct made it clear that it would examine the proposed regulation to determine whether the Act is drawn to protect the use which it purports to aid.

To summarize, during the early period of the history of the State, it, and the colonial government which preceded it, were chiefly interested in opening land for settlement and disposing of it through land grants, bounty rights, and land lotteries.[58] With the exception of the Georgia

Supreme Court's declaration in Johnson v. State that sovereign ownership of the foreshore was part of the common law of Georgia,[59] the concept of public ownership of tidal areas received little judicial elaboration. On the other hand, Georgia as a colony and as a state had clearly adopted the then current common law doctrines which have been described above.[60] Thus, there existed a doctrine of trusteeship for public purposes imposed on state proprietary ownership of foreshore areas, beds and waters of tidal streams, and beds and waters of marginal seas. It was implicitly established in Mayor & Aldermen v. State,[61] that these trusteeship rights could be abridged in the case where the Legislature determined such regulation was necessary for the improved use of the public right. However, what other restrictions attached to this trusteeship right was unclear. Much confusion and disagreement continue to exist today as to the nature of those restrictions.

B. Current Legal Doctrines Concerning Estuarine Ownership and Use

1. Foreshore Land and Lands Under Estuarine Waterways

By statute in 1902, and subsequently in Constitutional form, "the boundaries and rights of owners' of land adjacent to or covered in whole or in part by navigable tidewaters" was recognized as extending to low-water mark.[62] Similar legislation concerning title to beds of non-navigable tidewaters provided that ownership should vest in the owner of land

adjoining such non-navigable tidewater.[63] Superficially considered, the effect of this legislation would be to grant to the upland owner private property rights in the adjoining foreshore areas to the extent of the land between high and low-water mark. In the case of the landowner adjoining non-navigable tidewater, since the relevant statutory wording is in terms of owning the "bed" to the center of the channel, private property rights to this area also seem to be recognized.[64] However, qualifications in the Act itself indicate that "exclusive appropriation" of any tidewater, navigable or non-navigable, was not contemplated. The public retained the free use of any tidewater for the purposes of passage and "for the transportation of such freights as may be capable of being carried thereover."[65] These qualifications indicate recognition of the differing kinds of governmental rights in tidal areas--alienable rights as private owner, and trusteeship responsibilities which presumably cannot be alienated to private interests.[66] Such specific confirmation of the public easement of free use for purposes of "passage," along with transportation for some commercial purpose, comprehend public use beyond navigation.[67] There has been no useful interpretation by the Georgia courts of the meaning of the term "passage."

Clarification of the rights granted might well be sought in an examination of the history and purpose of both the Act and the later Constitutional provision. The Legislature passed the statute apparently as a response to the earlier Supreme Court decision in

Johnson v. State.[68] That case involved a prosecution for the wrongful taking of oysters from an oyster bed which the prosecution claimed was a private bed. The Supreme Court declared that the state statute defining generally the rights of riparians on navigable streams had not changed the common law rule providing that, absent specific grant or prescription, a landowner adjoining tidal waters owned only to the high-water mark. Consequently, there could be no wrongful taking from a public area which was below that mark. The apparent legislative concern prompting the enactment of the so-called Tidelands Act in 1902 was to afford landowners certain exclusive rights to the adjoining oyster beds. Similarly, records of the Constitutional Commission which drafted the 1945 Constitutional provision confirming this extension of title of lands abutting tidal water to low-water mark, indicate the provision was adopted in response to this interest in having oyster rights confirmed.[69]

Subsequent Georgia cases which have considered rights granted under the Tidelands Act all involve interference with an alleged right of the riparian owner of the foreshore, and of non-navigable beds, to exclusive oyster rights.[70] Though terminology characteristic of a traditional private property interest is used in describing and upholding the riparian's rights in these opinions--"under the law the owner of the adjacent land was the owner of the land under the stream"[71] and "property rights . . . extend to low-water mark"[72]--the cases dealt only with the question of the riparian's right to an injunction to restrain

interference with his oyster rights in tidal areas. Thus, there has been no determination of what are the limitations on the private use of foreshore lands and beds of non-navigable tidal waterways which are implicit in recognition of public rights in these areas. If the Tidelands Act were to be construed to provide an unrestricted grant of state property to private riparians, or a grant restricted only by the traditional navigation servitude, even with the later constitutional confirmation, its validity may well be questioned.[73]

The 1902 Act did not purport to deal with beds of navigable tidal waterways. Since the 1902 Act specifically provides that rights of riparians on navigable tidewaters extend only to low-water mark, the Act does not undertake to make the beds of navigable tidal waterways subject to private acquisition. Accordingly, the beds of navigable tidal waterways remain in the State unless a specific grant is shown. Of course any effort to grant these beds would be subject to public use limitations recognized under the public trust doctrine which was considered above.[74]

2. Estuarine Waters (of the Foreshore and of Navigable and Non-navigable Waterways)

Under the common law of the 1750's tidal waters were considered to be part of the King's domain. However, water problems were few and demand for use of water centered around navigation. This historic use

of water is probably the best explanation of the frequency with which the concept of "navigability" appears in the water rights cases.

In Georgia until quite recently there had been little development of the law of rights in waters of the tide by the public or private user. In 1971 an important decision, West v. Baumgartner, was handed down by the Court of Appeals confirming the doctrine that "ownership of tidal waters is in the State" as at common law, unless altered by subsequent State statute.[75] The case involved a controversy concerning public fishery rights in tidal waters and, of necessity, required interpretation of the Tidelands Act granting to the upland owner title to beds of "non-navigable tide water." The court, applying the statutory construction rule which requires strict construction of a law in derogation of the common law, concluded that the language of that Act to the effect that title or rights are vested for "all purposes" would not convey any rights in tidal waters, including fishery rights. Also, mere conveyance of title to land conveyed no rights in tidal waters.[76] The implication of the conclusion, that rights in such waters are to be determined by the common law doctrine, is to recognize State ownership, along with those limited riparian rights in tidal waters recognized at common law which were described earlier,[77] unless altered by statutes.

Other Georgia statutory law dealing with riparian rights in adjoining or overlying waters[78] would not be applicable to tidal waters unless so specified by the statute. Under the rationale of the Johnson

case, confirmed by the later West decision, statutes and case law defining the rights of riparians in non-tidal waters have no application to tidal waters.[79]

It would appear to be clear under present authority that rights in tidal waters generally are controlled by a doctrine of state ownership of such waters, along with recognition of certain non-exclusive common law riparian rights in those waters, essentially a right of natural use and of access.[80]

3. Submerged Lands of the Marginal Seas

The United States Supreme Court has continually recognized state ownership of lands beneath navigable waters within a state's boundary,[81] and it was assumed that this state ownership extended to lands under their marginal seas.[82] However, the Supreme Court in 1947, in a dispute between the federal government and California over proprietary rights to lands beneath marginal seas off the California coast, ruled that federal rights were paramount over this marginal sea belt, seaward of the state's inland waters.[83] Then, in 1953, the United States Congress passed the Submerged Lands Act.[84] The Act established in the states title to the beds of marginal seas extending seaward three geographical miles in width from their "coast lines."[85] However, for Gulf Coast states the Act set a possible maximum width seaward of three marine leagues (nine geographical miles).[86]

In the case of Georgia, the Act, together with supporting state legislation, recognizes the state's title to the beds of its marginal sea extending three geographical miles in width "from ordinary low water" or from the seaward limit of inland waters.[87] Since the State had no rights in this submerged land of the marginal sea until this grant from the federal government under the Submerged Lands Act, there could be no valid private title to this area from the State before 1953.[88]

While the nature and extent of the right of the respective states in this "marginal sea belt" along its "coast line" is ascertained, determination of the location of a state's "coast line" has caused difficulty. The importance of this determination is apparent when it is understood that it is from this line that submerged lands quitclaimed to the states are to be measured, and that pre-1953 "ownership" of this area existed only in the federal government.

The definition of "coast line" in the Act is "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[89] "Coast line" thus includes a low-water shoreline and also a "fictitious shoreline" which divides inland waters from marginal sea waters.[90] The determination of "ordinary low water" on the shore presents relatively little difficulty along Atlantic and Gulf shorelines.[91]

Greater difficulty is encountered in locating "the seaward limit of inland waters."[92] The United States Supreme Court in two recent

cases[93] has settled the definitional problem by holding that this line must be drawn according to the definitions of the Convention of the Territorial Sea and the Contiguous Zone.[94] In United States v. Louisiana the Court stated specifically that its holding in United States v. California concerning the application of Convention definitions was "for purposes of the Submerged Lands Act, and not simply for the purpose of delineating the California coastline."[95] However, an earlier decision had concluded that these definitions would apply only to those coastal states entitled to claim under that section of the Submerged Lands Act making an "unconditional" grant of what is encompassed by a seaward boundary of three geographical miles from the state's coast line.[96] Georgia is among those states claiming under this section;[97] accordingly, it is entitled to establish a "coast line" using these definitions.[98]

The "coast line" as defined by the Convention is the "modern, ambulatory coastline"[99] and "is to be taken as heretofore or hereafter modified by natural or artificial means . . . ."[100] This means that for states in the category under discussion the "time element" has been settled by the adoption of a theory of a "present coastline."[101] In addition, the Supreme Court has decided that the Executive Department's choice of international law principles in interpreting these definitions for foreign policy purposes is binding upon those using the definitions to determine state boundaries.[102]

Despite these clarifications, the application of the definitions to particular estuarine areas to locate the actual boundaries will require detailed, technical studies. An example of the problems which this undertaking will present, and obviously a very important one, is that of how to treat islands located close to the shore. The question arises as to whether these offshore islands form an integral part of the mainland. In United States v. Louisiana the Court declared: "the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast."[103] Those islands which "form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters," as well as islands which "form an integral part of a land form" are to be treated as part of the mainland.[104] Actual identification of those islands which may be considered to be a part of the state's coast and the impact of the International Convention in making that decision were left to a Special Master.[105] Georgia's barrier islands seemingly would be considered sufficiently tied to the mainland to be treated as an integral part of it. It should be noted that Georgia has undertaken to define the boundaries of the State by statute, and in doing so asserts a claim to all islands within twenty marine leagues of the seacoast.[106]

Another example of the problems to be solved is the delimitation of the seaward lateral boundary between adjoining states. This becomes a problem where the coast is indented as it is in estuarine areas. The Convention adopts the principle of equidistance,[107] but also gives certain exceptions where this principle would not apply--e.g., agreement between states, "historic title or other special circumstances."[108]

A Resolution adopted by the Georgia General Assembly in 1959 provides that the Secretary of State is authorized to contract for the making of a survey to determine the State's boundaries under the Submerged Lands Act,[109] but this resolution has not been implemented and the State has not taken a final position as to where, in its judgment, its coast line should be marked.

4. Tidal Waters of Marginal Seas

The notion that the width of a nation's marginal seawaters should be measured by the three mile range of a cannon was accepted by international writers in the 1800's. The English courts took judicial notice of this rule in a number of opinions.[110] In The Ann, Justice Story wrote: "All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot, or marine league, over the waters adjacent to its shores . . . and this doctrine has been recognized by the supreme court of the United States . . . . Indeed such waters are considered as a part of the territory of the sovereign."[111] The problems

now involved in water law were not recognized clearly in early periods, so that a statement of federal sovereign ownership would not be conclusive for all purposes. And it is more than probable that a state theory of a three mile interest in the adjoining marginal seas also represented the existing law[112] as it was understood before 1947 when, as mentioned, earlier, the United States Supreme Court (in United States v. California) held that the original states had no proprietary interest in the marginal seas, and even if it is assumed that they had had such rights, these were surrendered to the federal government under the doctrine of paramount rights upon admission to the Union.[113]

The Submerged Lands Act abrogated federal proprietary claims to lands underlying marginal seas and "the natural resources within such lands and waters" in the manner already discussed.[114] The question now posed is that of determining the extent to which that Act recognized rights in the states in marginal sea waters. The Act does not expressly quitclaim the right to waters of the marginal seas as it does to the underlying beds. It does vest in the states title and ownership of the "natural resources" within the submerged lands and overlying waters. However, the Act in its definition of "natural resources" states that the term "does not include water power, or the use of water for the production of power."[115] Reasoning from the express denial of a right of use for one specific purpose, it could be argued that the statutory language implicitly recognizes that the states have a proprietary right

for other, non-excluded purposes as far as the state's marginal sea boundary extends.[116] There have been no cases dealing with this question. However, it seems likely that the Act will be construed in the manner indicated to recognize that all rights of use vested in the State with the exception of the right to the use of water for the production of water power.

C. Legal Doctrines Concerning Ownership and Use in Special Areas

1. Accretion, Reliction, Erosion, Avulsion

The principle that a riparian owner has a right of access to waters adjoining his land embodies one of the most valuable rights of riparian property. The changes on a shoreline or bank may affect and interfere with this access. Basically, the changes that occur are of two types--one, involving the removal or deposit of soil on a bank or shore; the other, involving a change in the water itself, so that land once constantly submerged becomes uncovered, or land formerly constantly dry is covered.

Before undertaking to discuss the development of the law relating to these phenomena, it is necessary to give specific content to certain terms used to describe the various physical changes which take place. "Accretion" may be defined as "gradual and imperceptible accumulation of land by natural causes," resulting from a deposit of soil ("alluvion" is the term for this deposit upon the shore or bank). A recession of water

leaving uncovered land once submerged[117] is termed "reliction" or "dereliction." "Erosion" can be defined as a gradual and imperceptible washing away of soil by natural causes.[118] "Avulsion" describes a change either of land from one shore or bank to another, or in the waters of a waterway, so that the bed or some part of it becomes dry land, when that change is both sudden and involves more than an inconsequential quantity of land. Different rules may apply when these changes are caused by natural phenomena as distinguished from artificial causes. Furthermore, on considering changes by artificial means, a distinction may be recognized depending upon whether the upland owner or someone else was the source of the artificial accretion.

(a) Non-navigable Tidewaters

At common law the controlling factor in determining whether change affected private rights was whether the change was gradual and imperceptible, or sudden. When a shoreline is changed gradually and imperceptibly by accretion, relicition, or erosion, the boundary likewise changes, but when the change is sudden, the boundary remains as it was before the change.[119] In Georgia, this common law rule would seem to have been expressly reaffirmed by statute where non-navigable tidewaters are concerned.[120] This statute, in describing the boundary of the upland owner on non-navigable tidewaters, provides that:

> If the water is the dividing line, each owner's boundary shall extend to the main thread or channel of water. If the main thread, or center, or channel of the water changes gradually, the line follows the same, according to the change. If for any cause it takes a new channel, the original line, if capable of identification, remains the boundary. Gradual accretions of land on either side accrue to the owner.[121]

The term "any cause" in the statute would seem to mean a sudden or considerable change in the center or channel of a stream.[122]

(b) Navigable Tidewaters

In the case of "navigable tidewaters" statutory law specifies that the upland owner has rights which extend to low-water mark.[123] Consequently, regardless of whether additional land is added to the shore or bank by gradual, imperceptible change or by avulsion, rights to the low-water mark continue to exist. This is also true irrespective of whether there is sudden or gradual encroachment upon, or submergence of, water on the shore. There have been no cases in Georgia determining rights in estuarine areas where these ownership problems are concerned.

(c) Wharfing Out

Although there is regulation of wharves by statute in Georgia,[124] there is no statutory consideration of the right to construct wharves nor has there been found judicial exposition concerning such a right. In the absence of express recognition of such a privilege or right in the upland

owner on tidal waters, it is assumed that the common law concerning wharfing out would continue to be applicable.[125] The common law did not recognize in the upland owner on tidal waters an unqualified right to build wharves but allowed this activity where there was no interference with Crown or public rights.[126]

The building of such artificial structures ordinarily results in gradual accretions because of the change in the water flow and the resulting deposit of alluvion. The accretion would in some instances tend to extend the upland owner's property at the expense of the owner of the bed which is in most cases the State. Again, however, there has been no case law dealing with artificial accretions in Georgia.

2. Adverse Possession, Prescription, Dedication

The doctrines of prescription, adverse possession, and dedication provide legal methods of acquiring rights in property through use.[127] These doctrines existed at common law and are not usually defined in complete form by statute. The generally accepted definitions are useful for an understanding of the law in this area even though statutes and courts at times use certain of them interchangeably as if they were synonymous. Usually the term "prescription" is descriptive of conduct considered to create only an easement, whereas "adverse possession" gives title; but as will be seen, some states such as Georgia use the term "prescriptive" as a part of its definition of both types of interest.

The methods of creating rights in property by prescription and adverse possession are substantially the same--there must be continuous, open and adverse use by the claimant.[128] However, for adverse possession, the use must also be exclusive.[129] The prescriptive right, because it is considered an easement, is not usually thought of as inconsistent with use in common with the owner. The period of use necessary to create these rights varies. The time period to perfect adverse use is usually specified by statute. "Dedication" results from an express or implied manifestation of intention of the owner to allow the public to use his property.[130] Only the public can acquire rights in property by dedication.

In Georgia, statutory law provides for "title by prescription,"[131] "prescriptive right to easement,"[132] and "dedication of land to public use."[133] Though by statute no prescriptive title can be acquired in lands belonging to the State, there is no prohibition which prevents the State from gaining title in this manner.[134] Adverse possession to create "title by prescription" must be adverse use for twenty years by the possessor that is public, continuous, exclusive, peaceable, and accompanied by a claim of right.[135] If actual adverse possession is under written evidence of title, a period of seven years' use is sufficient to give "title by prescription."[136] Possession to assert title to property may be "actual" or "constructive." Both of these categories are dealt with by statute.[137]

Since title by prescription may be acquired in any property capable of adverse use, except property of the State, prescriptive title to

minerals and timber also may be acquired.[138]

In addition, incorporeal rights or easements may, according to Georgia statute, be acquired by prescriptive easement.[139] It is recognized that the public may acquire such prescriptive rights.[140] In the absence of express statutory rules on the subject, Georgia courts have extended the rules governing the length of time for which possession is required for statutory title by prescription to prescriptive easements.[141] Also, Georgia case law has recognized that permissive use may, in some circumstances, serve as the foundation for such an easement.[142]

The two essentials for dedication of land for public use--intention of the owner to dedicate, and acceptance by the public--may be express or implied.[143] Historically, dedication usually has been employed to create public roadways. It is generally recognized that public use of lands as a roadway with some public maintenance for a twenty-year period constitutes a valid dedication. The cases have reasoned either that the owner acquiesced in such use if it continued for such a period so that there is implied dedication, or that use for this time amounts to prescriptive title.[144] Where there is express dedication by the owner such as use of direct language or performance of acts like laying out of a street, and there has been public use so that interruption of use would affect public or private rights, there is an effective dedication even though a twenty-year period has not lapsed.[145] The statutory law in Georgia provides only for dedication of lands for public use, but the case law has also recognized dedication as applicable to other types of

property rights such as wharf property and rights in a non-navigable stream.[146]

3. Ownership and Use of Certain Natural Resources

Natural resources within estuarine areas, because of the multi-dimensional nature of these areas, potentially exist on the surface and within estuarine waters, on and under the tidal foreshore, and on and under the estuarine bed. Resources such as waterfowl and fish which exist on the surface or within the water column, because of their mobility, differ from other natural resources.

At common law, fish and other wild animals while in their natural state, being ferae naturae, were recognized as being owned in trust for the common use of the people.[147] In addition, there was a common right to reduce ferae naturae to possession in tidal waters unless such right was restricted as where there had been grant of an exclusive right of fishery.[148] At common law there was Parliamentary power to grant such fishery rights in tidewaters; therefore, the states which succeeded to Crown and Parliamentary powers had this right unless restricted.[149] This common law right to fish and hunt in tidal waters, subject to state regulation, became a part of the common law of Georgia.

In Georgia, by an Act adopted in 1968, there was a broad assertion of state ownership, jurisdiction and control over all "wildlife" within the reaches of the State's sovereign power.[150] The statutory definition of

"wildlife" includes all animal life, vertebrate and invertebrate, including fish, birds, amphibians, mollusks.[151]

A public right of fishing in tidal navigable waters and in the foreshore of these areas, was expressly recognized by the Tidelands Act of 1902.[152] The common law doctrine of a public right to fish and hunt in all tidal waters, subject to state regulation, has been subsequently reaffirmed in the recent Court of Appeals case, West v. Baumgartner.[153] In addition, the court held that that section of the Tidelands Act recognizing that riparians have certain rights in non-navigable tidewaters did not convey to them any exclusive right of fishery in those waters.[154]

Other Georgia legislation relating to specified tidal areas has recognized certain exclusive riparian fishery and hunting rights. Two companion sections of a 1955 Act prohibit the public from fishing, hunting in or entering with such intent, any salt water creek, stream, or estuary leading from the Atlantic Ocean when the stream involved ends in an island used and maintained as a public or private game preserve which is owned by one ownership, family or estate.[155] One effect of this Act, in prohibiting fishing and hunting in tidal streams where the stream is of the character described, is to extend private fishery into areas theretofore considered to be public. As part of the same legislation, a private right of control over shellfish and waterfowl in all upland owners of tidal streams or estuaries was recognized.[156] If there was joint ownership, control was to be exercised jointly. In addition,

such upland owner was "seized and possessed with exclusive right to take shellfish" from this area.[157] Sport fishing and certain kinds of commercial fishing in these tidal areas were excepted from the limitations of the Act.[158] The enforcement provisions of the Act depend on "posting" of the estuarine area.

Theoretically, there is a contradiction between certain provisions of the latter Act and the later 1968 Act which specifically states that the right to own and control wildlife is in the State. The provision of the 1968 Act declaring that to hunt, fish, or capture wildlife, to possess or transport same, is a "privilege" enjoyed by the public is inconsistent with recognition of private rights of full control in upland owners on tidal streams. This inconsistency may be avoided if the assumption is made that the 1955 Act did not intend to deny the State's power of regulation concerning wildlife. It is also possible that such attempted assertion of private control over waterfowl and shellfish in these areas will be found to be inconsistent with the notion that the state owns and controls wildlife as a trustee for the public.

The Tidewater Act conveys to the adjacent landowner the exclusive right to all shellfish in non-navigable tidewaters, and the exclusive right to oysters and clams down to the low-water mark in navigable tidewaters.[159] There is also statutory authority for the State Game and Fish Commission to lease to others state owned oyster beds of navigable tidewaters.[160] The latter statute in addition provides for leasing of

beds for cultivation of oysters, which would appear to be a use for a public purpose related to the natural use of the resource. It should be noted that natural oyster beds are not to be leased; the lessee must plant shellfish in artificial beds.[161] As a consequence, the state lessee has not only a real property interest because he has leased a bed to carry on a private right of fishery but, in addition, a personal property interest since planted shellfish, being domitae naturae, are classified as domestic animals.[162]

The minerals in estuarine areas are a natural resource of special interest. In Georgia these resources involve, among others, sand and gravel, phosphate deposits, heavy minerals from which titanium is obtained, limestone and shell deposits, clay materials and a potential for petroleum.

If the general rule that ownership of land includes mineral rights is followed, then the right to minerals is determined by ownership of the particular land area involved.[163] There is also authority for the proposition that where grant of public lands is involved express grant or title to minerals is necessary if these are claimed.[164] This may be considered an illustration of the judicial rule of strict construction with regard to grants in the area of tidal public lands. Thus, should this rule apply, to establish private mineral rights a specific grant of foreshore or submerged tidal land and the mineral rights thereunder would be necessary. The State Mineral Leasing Commission, created by a

1945 Act, was given the power to grant exclusive mineral rights in all State-owned lands and water bottoms through its leasing authority.[165] In Georgia this would include the beds of inland estuarine waterways which are "navigable," and the submerged lands of the marginal sea from the State's "coast line" to the present three geographical mile limit. Whether or not foreshore areas and beds of "non-navigable" inland estuarine waterways and the foreshore of inland tidal navigable waterways and of the marginal sea are considered State-owned for mineral rights purposes depends upon the construction given the Tidelands statute,[166] and the determination of what legal doctrines control the right to minerals in these areas.[167]

Though one avenue of approach to state control of estuarine resources is dependent in large measure upon the legal doctrines determining public and private ownership, which have been the subject of discussion, the existence of certain private interests in estuarine areas does not preclude state control. This power of the state to regulate even where private interests exist is extensive. A discussion of this approach as a basis for regulation of the area in question is dealt with in the following section.

D. Other Statutory Controls

1. Background

Public concern about the maintenance of estuarine environmental quality has resulted in increased legislative interest in programs for conservation and management in this area. The state's power, and the capacity in which it may seek to control the estuary to that end, will vary with the type of ownership interests which the law recognizes in the specific area under consideration. If the estuarine area is state-owned, then state public policy can readily be adhered to and implemented to the fullest extent. Regulations restricting activities in areas recognized as privately held, or in which there are recognized private interests are quite likely to be questioned in the courts. These statutory regulations take a variety of forms.[168] Usually, today, zoning and permit statutes are resorted to for this purpose. Innovative estuarine controls where zoning is not practical may very well in the future simply take the form of expanded water quality laws.[169]

Where affected estuarine lands and waters are considered private property the regulation in question will be examined to determine whether it comports with federal and state Constitutional requirements which prescribe a "taking" of private property without due process of law. This requires a judicial determination of whether the regulation is a valid or, as the principal inquiry is usually put, a "reasonable"[170]

exercise of the state's "police power" to legislate to protect the "public health, safety, morals and general welfare." If valid, the regulation must satisfy two criteria: first, power must have been exercised for a proper purpose, and second, the particular purpose must be one which may be accomplished lawfully through regulation without resort to condemnation under the state's power of "eminent domain." Conservation, and estuarine conservation specifically, has been recognized to be a proper purpose for use of police power regulation.[171] However, the particular criteria which will be used in making a decision as to whether this proper purpose may be effectuated by such a use of the police power, or whether resort to eminent domain power is required, remain imprecise. The question has received much attention from the commentators.[172]

On the other hand, little attention has been given to the implications of the public trust doctrine in regulating areas in which interests are held subject to it, but which are otherwise thought of as being "privately" held.[173] Commentators for the most part have discussed the trusteeship doctrine as it functions to restrain state action in dealing with these land and water areas. If the trust obligation imposes particular restraints on governmental action in these areas in the public interest and in recognition of the public's rights, it would seem also to imply power in the state to regulate, different in kind from the state's general police power. This affirmative interpretation of the trust obligation may

be recognized as but another way of stating that these special areas which are in private as well as public hands continue to be impressed with the trust servitude.

Another important question certain to occupy the courts is whether these comprehensive control schemes such as zoning or expanded water quality control statutes have impliedly repealed, or limited, the older regulatory legislation which directly or indirectly affected the estuarine area such as that dealing with fishing, mining, highways, drainage districts and the like.

2. Statutory Regulation in Georgia

Georgia's recently adopted "Coastal Marshlands Protection Act" provides for some management and conservation power over estuarine areas.[174] It prohibits altering coastal marshland without a permit. The Act provides that "[n]o person shall remove, fill, dredge or drain or otherwise alter any marshlands . . . within the estuarine areas thereof without first obtaining a permit from the Coastal Marshlands Protection Agency."[175] It not only prohibits such activities without permit but also any activities which would "otherwise alter" marshland. Thus, and importantly, it would appear that "indirect" as well as "direct" alteration is included within the prohibition. For example, activities which initially only affect estuarine waters, such as dredging or diking

in tidal waters or changing the tidal flow, might well be interpreted to be activities which "otherwise alter any marshland."

In determining whether a permit is to be granted, the Coastal Marshlands Protection Agency must consider the "public interest": that is, whether the proposal (1) involves "any unreasonably harmful obstruction to or alteration of the natural flow of navigational water"; (2) creates any "unreasonably harmful or increased erosion, shoaling of channels or stagnant areas of water"; (3) involves any unreasonable interference with the conservation of "marine life or wildlife or other natural resouces" such as "fish, shrimp, oysters, crabs and clams."[176] Several agencies and activities are exempted from provisions of the Act, among the most important of which are the State Highway Department, agencies of the United States government and of the State charged with navigation responsibilities in rivers and harbors, certain activities of public utility companies, and activities of companies which construct and maintain bridges and railroads.[177]

To aid in clarifying state policy and to implement planning in the area the Ocean Science Center of the Atlantic Commission, established in 1967, has been invested with planning powers for coastal and offshore waters.[178] Other planning commissions also exist on the state and local level with broad planning powers.[179]

In addition to this legislation, there are several state agencies which are empowered to acquire, regulate and develop coastal areas

for certain purposes. A listing would include the State Game and Fish Commission, the Department of State Parks, the Jekyll Island State Park Authority, the State Ports Authority, the Georgia Coastal Scenic Highway Authority, and County and Municipal Development Authorities.[180] Those agencies which are not excluded from the Act, it seems clear, must comply with the Coastal Marshlands Protection Act where their activities involve direct alteration of coastal marsh. As has already been noted, careful reading of the Act would seem to require that permits also be obtained where there is indirect alteration of protected coastal marsh,[181] such as that resulting from dredging of harbors or waterways by County or Municipal Development Authorities.[182] However, other agencies such as the State Ports Authority, which is charged with the maintenance and improvement of harbors in the State, and which is exempted from permit requirements, can develop marshlands which it acquires for special purposes without regard to the policies of the Coastal Marshlands Protection Act.[183]

Thus, in Georgia, regulatory control of the estuarine area consists primarily of permit regulation of the coastal marshlands. There are, however, exempted activities and agencies which affect substantial portions of the area. Essentially this is "single purpose" legislation which affords recognition of non-exploitative uses of marsh in the permit evaluation procedure. There is no "multi-purpose" estuarine area or

coastal zone management legislation which would focus on planning for both conservation and development of the area.

THE SOUTH CAROLINA LAW

A. Early History of Estuarine Law

The English common law concerning the lands and water of tidal areas has been discussed at length at the beginning of the materials relating to Georgia and is equally applicable to the study here because it was this law which became a part of the legal system of South Carolina.

South Carolina, as an English colony, was governed first as a proprietary colony from 1670 to 1719 by the Lords Proprietors of Carolina, under charters from Charles II.[184] The two charters of 1663 and 1665 from Charles II to the Lords Proprietors provided that laws enacted by the Proprietors with the advice of the Freemen of the Province should be "as near as may be conveniently, agreeable to the laws and customs of this our Kingdom of England,"[185] and in the case of those ordinances which, out of necessity, might have to be enacted without the advice of assemblies of freeholders, they should be "not repugnant or contrary, but as near as may be agreeable to the laws and statutes . . . of England."[186] And in 1712 an Act was passed which specifically stated that all English common law (with certain exceptions not important here) was in full force and effect in the colony.[187]

With the overthrow of the proprietary government, the province became a royal colony from 1720 to 1776.[188] The instructions which accompanied the royal governor made provision for a different form of government in the Colony,[189] by providing for a Governor, Council and Assembly.[190] Provincial assemblies of the province were given power to make local ordinances not repugnant to English law.[191]

After the American Revolution the State of South Carolina succeeded to all the rights and powers of the English King and Parliament.[192] Early South Carolina constitutions provided for continuing in force all former colonial laws not repealed or temporary.[193] That the common law, generally, continued to be the law of the State except where repealed or changed, has been recognized by the courts of South Carolina in numerous decisions.[194]

These Charters from Charles II granted all the land and waters within the specified boundaries to the Proprietors and provided that they could freely alienate their holdings,[195] a privilege which they exercised extensively. Following the transition to a royal colony, these grants or patents from the Lords Proprietors, if registered, were recognized by the royal governor in the Quit-Rents Act of 1731.[196] Later these grants were validated by the State of South Carolina by statute.[197] The State also validated by statute title to lands claimed under actual possession for five years prior to July 4, 1776.[198] In 1784, the State Assembly passed a general Act for granting "vacant land."[199] There is no

definition of "vacant land" in the Act, the general purpose of which was settlement and cultivation of unsettled areas of land.[200] An Act of 1787 which uses the term "vacant land" in describing grant of submerged tidal lands further describes the "vacant land" as that "covered by water."[201] It would appear to have been assumed that the term "vacant land" without explanation would not have been sufficiently descriptive to denote this estuarine land.

On the other hand, some early tax statutes appear to proceed on the assumption that estuarine lands were generally the subject of grant. The Act of 1784 provides that a tax shall be "imposed on all lands granted within this state" and defines different categories of land for tax purposes, among which were three categories of "tide swamp."[202] Later acts continued these or similar classifications for taxation purposes.[203]

Certain early statutes did deal particularly with foreshore areas and water lots. An Act of 1714, in providing for the building of a seawall for the City of Charleston, contained certain regulations concerning claims to foreshore areas, and a later Act, also concerning Charleston's seawall, provided a method for settling disputes between claimants of these foreshore areas.[204] The "ownership" in the foreshore recognized in those Acts is a limited ownership, as is made clear by specifying that "any person that hath right to any of the said lots . . . from high-water to low-water mark, shall only have liberty of building of wharfs

and bridges upon the same, and not any house, edifice or other buildings . . . ."[205] An Act of 1787 made it lawful forever for persons to carry off oysters and oyster shells below high-water mark from land for which surveys had been taken out where the survey had not been passed and confirmed by grant under the governor's signature.[206] The same Act provided that owners of wharves and low water lots in Charleston could obtain grants for land covered by water in front of their wharves or lots as far out as specified channels in the Ashley and Cooper rivers.[207]

These acts from the pre-statehood era concerning estuarine lands (foreshore areas and land under tidal waterways) are not inconsistent with a theory of public trust in tidal areas. The statute settling disputes of claimants to foreshore areas on the bay of Charleston, coupled with the requirement that persons having a right to such foreshore area build part of the seawall, indicated that the private right to the foreshore area was limited.[208] Such a person might use the area in question for building a wharf or bridge but not other structures. Recognition of public use of foreshore areas for the taking of oysters and oyster shells would not be inconsistent with trust ownership, and allowing owners of wharves and low water lots to obtain grants of land covered by water in front of their wharves or lots out to specified river channels might well be considered an extension of the privilege of wharfing out.[209] The tax statutes mentioned which differentiate to some extent between estuarine

and other types of land to be taxed might be considered as taxing whatever interests had been alienated. For example, the "private" ownership of Charleston bay foreshore and low-water lots was understood to be limited by public use.[210]

The early Constitutions adopted by the State do not consider the matter of disposition of lands or waters. They do, however, provide that laws in force in the Colony, or State, should remain in force until altered or repealed.[211] The Constitution of 1868, the first of South Carolina's Constitutions to be ratified by the public, required that all grants be issued in the name of the State and recognized all navigable waters of the State to be common highways free to all.[212] The 1895 Constitution specified that lands belonging to, or under the control of, the State should never be donated, directly or indirectly.[213]

Early case law reveals the same ambivalence found in the early statutes concerning the State's power and intent in providing for grants touching estuarine areas. The Oak Point Mines case, decided in 1875, stated that State statutes conclusively revealed that land under tidal navigable waters might be the subject of grant.[214] This land flowed by the tide was considered to be like all other vacant land and no special act of the legislature was necessary to confer title to it.[215] The statutes which the court regarded as "conclusively" evidencing this were the early taxation statutes, the acts concerning the building of a seawall for the City of Charleston and regulating claims to the foreshore areas,

a statute reserving for public purposes all vacant land covered by water which was not privately held in the Charleston harbor, and the Act with respect to gathering of oysters and oyster shells in the foreshore areas by members of the public.[216] Navigability was treated as being of importance only for the purpose of deciding whether the stream involved was tidal navigable water. The foreshore area of these tidal navigable waters in controversy here was found to be privately owned under a grant specifying a boundary to the "low-water mark." However title to the bed was said to have remained in the State because there was no express grant, nor were there long continued acts of ownership in this area.[217]

Several years later the Supreme Court of South Carolina, in State v. Pacific Guano Co., determined that beds of navigable tidal creeks were not "held by the state simply as vacant lands, subject to grant. . . in the usual way. . . ."[218] The court declared that "[t]he state had in the beds of these tidal channels not only title as property, the jus privatum, but something more, the jus publicum, consisting of the rights, powers, and privileges derived from the British crown, and belonging to the governing heads."[219] In reaching this conclusion the court considered in detail the common law doctrine that certain lands and waters were held by the crown and later by Parliament in trust for the people.

In the course of determining the extent and nature of sovereign ownership of tidal areas the court equated the notion of "tidal" with

"navigability" of waters at common law, and stated that tidal streams are navigable in law only when navigable in fact.[220] As a consequence of having thus confused these early common law doctrines, the court was led to the conclusion that the public land flowed by the tide included only areas which were navigable in fact.[221] However, the "common law boundary rule" of tidal areas was stated to have remained unchanged.[222]

This "boundary rule," that a grant of land bounded by tidewater extends only to ordinary high-water mark absent specific words in the grant indicating a lower boundary, was considered later the same year in State v. Pinckney.[223] There it was held that marshland below high-water on tidal navigable streams remained in the State except for specific areas named as granted, adhering to the principle that a deed calling for boundaries on tidal navigable streams conveys only the land to the high-water mark. The court quoted with approval the statement: "If the boundary be a navigable stream, that is, one in which tide ebbs and flows, the land extends only to the water's edge, or to high-water mark."[224] This was its conclusion despite the court's stated awareness of the change of the definition of "navigability" in its earlier decision. Assumedly, the court, when it equated "navigable" with tidal, and gave the term "navigable" the definition of "navigable in fact," saw this as affecting only the concept of sovereign ownership of tidal areas, leaving unchanged the common law boundary rule of strict construction of grants affecting lands bounded by tidal waters. For purposes of the latter, "navigable"

was not a question of "navigable in fact," but was simply equated with the presence of tidal waters.

In Heyward v. Farmers Mining Co., decided in 1894, the test for navigability and, consequently, for sovereign trust ownership of tidal areas under this doctrine, was stated to be capacity for navigation irrespective of the type of boating or the fact of actual use.[225] In addition, the court in this case clearly subscribed to the principle that beds under navigable tidal waters could not be alienated under the statutes providing generally for granting of vacant lands.[226] The court indicates four limitations on the power of the state to dispose of these trust lands. The disposition must be conducive to the best interests of the state's citizens; it could be made only through a special legislative act expressing clearly the intention of the legislature; there could be no grant of all the lands or waters subject to the trusteeship; there could be alienation only of those trust lands which do not impair "the public interest in what remains."[227]

The vigor of the court's opinion may be seen in its selection of this quotation from the classic Illinois Central case:[228] "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment

of the public interest in what remains, than it can abdicate its police powers. . . . [W]ith trusts connected with public property, or property of a special character, like lands under navigable waters, they can not be placed entirely beyond the direction and control of the state."

To summarize the case law of this early period in South Carolina, beds of tidal navigable streams could be alienated only by special legislative act and then subject to trusteeship limitations. The scope of the term "navigable" was enlarged to include pleasure boating as well as boating for commercial purposes. Thus, the beds of tidal streams capable of valuable floatage, whether for pleasure or commerce, would be subject to these restrictions as to alienation. It should be noted that, through an expanded test of "navigability" for determination of title to tidal beds, almost all of these areas could be considered subject to public trust restrictions (thus the case law had almost returned to the common law concept of sovereign trust ownership of all tidal beds). Foreshore areas of all tidal streams would be subject to the common law boundary rule that grant of land in these areas extended only to the high-water mark, absent specific words in the grant indicating low-water mark.

B. Current Legal Doctrines Concerning Estuarine Ownership and Use

1. Foreshore Land and Lands Under Estuarine Waterways

The nineteenth century cases which were discussed in the previous section to which the State was a party involved a determination of rights to phosphate beds. When interest in mining phosphate declined in the early part of the current century, the cases concerning estuarine areas which came before the appellate courts usually dealt with either rights to oyster beds or interests in lands for real estate development purposes. In Alston v. Limehouse,[229] decided in 1901, the plaintiff, a riparian, sought injunctive relief against defendants' trespass for gathering oysters in an area bordering a navigable tidal stream. The court recognized the validity of plaintiff's claim to ownership of the foreshore area between high and low tide. The court reasoned that since these areas when covered by high tide were not navigable in fact (were not of sufficient depth and width "to float useful commerce") they were not publicly owned, because navigability determined the areas of land publicly held. In this connection the court examined the grant from George II and construed its terms to have the effect of granting the marshlands within the "boundaries" of the grant to plaintiff's predecessors in title, and thus to the plaintiff.[230] There was no consideration of the common law "boundary concept" that a grant of land with tidewater

boundaries passes title only to the high-water mark, absent specific inclusory words.

The "boundary concept," however, was the basis for decision in the Cape Romaine case, decided almost thirty years later.[231] There also the plaintiff complained of trespass by the defendants who were gathering oysters in the foreshore area claimed by plaintiff and injunctive relief was sought. The court stated that the boundary line is high-water mark on a tidal navigable stream in the absence of "specific language showing that it was intended to go below high-water mark" and that "the portion of land between high- and low-water mark remains in the State in trust for the benefit of the public interest."[232] Words in the plaintiff's deed giving boundaries as "the Atlantic Ocean, certain bays, islands, marshes, streams, etc." were not specific enough to prove title to foreshore areas in tidal navigable streams.[233]

Twenty-two years later the Supreme Court of South Carolina, in the Rice Hope case, in reaffirming its holding in Cape Romaine, stated its conclusion in these terms: "title to land below high-water mark on tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes."[234] Both the Alston and Cape Romaine courts apparently would have considered the beds of navigable tidal streams to be owned by the State although the focus of these cases was upon ownership of foreshore areas. This conclusion seems warranted because these beds were necessarily

characterized as being "ways useful for commerce", according to the Alston case and "ways in which the tide ebbs and flows" and, consequently governed by the special rules which had developed concerning alienation of tidal areas, according to Cape Romaine.[235] It seems clear that these later cases, in dealing with state grants to private grantees, thus adhere to the general position taken in the earlier cases which had recognized state ownership of the beds of navigable tidal streams.[236]

However, there was less clarification in the area of ownership of beds of non-navigable tidal streams. The two theories of ownership of tidal beds--sovereign ownership because of navigability and sovereign ownership because of tidal character--do not conflict where navigable tidal beds are at issue. But where non-navigable beds are concerned, public ownership could result only if the tidal character concept is considered to be controlling, thus requiring application of the special rules as to alienation, in this case that specific inclusory words are needed in a grant of land bounded by tidal waters if it is to extend beyond high-water mark.

The early cases clearly consider non-navigable tidal bed ownership to be determined by the "navigability" theory. In the Pacific Guano case the Supreme Court stated: "We cannot hold that the bed of a creek not navigable, although tidal, belongs to the state to the exclusion of the riparian proprietor."[237] In defining "navigability" the court referred to definitions in a number of other cases which had used the term, but

would appear to have approved that of capacity for use for purposes of commerce and transportation regardless of actual use or type of vessel. In a second early case, Heyward v. Farmers Mining Co., the court broadened the concept of "navigability." While the criterion of capacity for navigation without reference to the type of craft or actual use remained, the purpose of use was considered immaterial.[238]

The post-1900 cases do not deal with ownership of beds of non-navigable streams as such. However, the cases approved ownership concepts with respect to foreshore areas which would appear to apply also to lands underlying non-navigable tidal streams. For example, the Alston case[239] continued to subscribe to the theory that navigability was determinative of the area of sovereign ownership and was more restrictive in its definition of navigability (capacity for the purpose of useful commerce) than the Farmers Mining case just discussed. On the other hand, the conclusion in the later Cape Romaine case that the common law boundary concept (one of the concepts which developed concerning alienation of trust areas) was applicable to tidal streams indicated judicial adherence to the tidal character theory of sovereign ownership.[240] This rule of alienation concerning tidal areas which had not been changed in South Carolina, it will be recalled, requires specific inclusory words for grant of land bounded by tidal waters to include areas below high-water mark, and if applicable to determination of any ownership claims in estuarine or tidal areas, would apply to one part

as well as to another.

A second body of doctrine concerning ownership of foreshore areas, including, in some instances, submerged "water lots" and, consequently, since the latter are tidal beds, land under tidal waterways, has developed in the context of controversies concerning State grants to the City of Charleston. Several of these cases have involved title controversies between private parties in which there has been no consideration of possible public ownership, either because it was stipulated that the foreshore area was effectively granted,[241] or because the court refused to try the validity of such a claim in the absence of appearance in the action of the entity in whom such an interest might reside.[242]

In another of the cases involving only private parties,[243] one of the parties, by way of justification for his failure to purchase reclaimed marshland lots as was alleged to be necessary to establish his right to the disputed area, relied upon an Act of the Provincial Assembly adopted in 1768 which appropriated the area as a "common" for the City of Charleston.[244] The court stated that this Act, even if enacted by the legislature after statehood, could not bind future legislatures. Hence, a subsequent Act of the legislature by which the City of Charleston was incorporated and granted certain marshlands formerly appropriated for a common, but to be sold as the council should think most conducive to the City's welfare, was valid. Other arguments of the defendant to the effect that there are restrictions on the right of the legislature to

sanction a change of use of a public grant because the restriction existed more particularly in favor of abutting landowners who have a vested right in the use of the common, as well as the contention that such a grant was for a restricted portion of the public and "was not a grant to the public in the sense of the principle contended for," also were rejected. In this connection the court asserted that abutting landowners have no easement over public land.[245]

In two later cases actions were brought against the City of Charleston which raised the question of the power of the City to convey foreshore areas and submerged land areas which had been granted to it for real estate development. The first of these cases, Haesloop v. City Council,[246] involved a purported donation by the City of reclaimed water lots, which were formerly submerged land areas, for hotel construction. In a rather complicated opinion the court declared that this action involved no violation of the Constitution of 1895 prohibiting donation of land belonging to the State because this land could not be characterized as State land since the area in question, by virtue of the Act of August 13, 1783,[247] vested in the City of Charleston before the adoption of the 1895 Constitution. The court noted that no question was raised by the parties as to whether there was a limitation on the State power to alienate because of "rights of navigation or of piscary or other public rights."[248] In the absence of such a contention, the grant was considered to be an "unlimited power of disposal in trust for the benefit

of the public of the municipality of Charleston,"[249]--a grant to be used for the benefit of the local public. The legal test for determining the appropriateness of the Council's action as "trustee" was stated to be that standard applicable to a trustee of a private estate. The local interest in obtaining a tourist hotel for the City was considered by the court to be sufficiently affected with a public interest to satisfy the test.

In a more recent case, Ehrhardt v. City Council,[250] there was an attempt to have declared void a deed of land "consisting chiefly of a mud flat," generally covered by high tide, which had been given by the City Council to a prospective apartment house builder. As in the earlier West End case, the argument was made that the property was originally dedicated as a "common" by the Provincial Assembly. The court, in rejecting the argument, listed the legislative acts by which grants of submerged and foreshore land were made to the City, determined that the land in controversy was within the area granted and concluded that there could be no question that the City owned these areas in fee simple. The court considered and found untenable the argument that lands dedicated for a common by the Provincial Legislature of South Carolina were "to be deemed forever so dedicated."[251] And since the State statutes in question provided that the Council had power to sell or lease for "public and commercial" purposes, and an apartment building could be so classified, the court upheld the validity of the Council decision and the grant made to effectuate it.

It should be noted that in neither the Haesloop or the Ehrhardt cases was there a consideration of the "public trust" doctrine as it affects a municipal grantee. Presumably, a state grant of these tidal areas could be made to a municipality only when subject to the same duty to deal with the areas in a manner consistent with public trust responsibilities as was impressed upon the State itself. It will be recalled that the Supreme Court of South Carolina in the Haesloop case specifically noted that no question of the limitations on State power to alienate because of "rights of navigation or of piscary, or other public rights" had been raised by counsel[252] and, it would appear, played no part in the court's reasoning.

These statutory grants to the City of Charleston of foreshore areas and inland submerged lands began in 1768 with an Act dedicating vacant marshlands as a "common" for Charleston.[253] Upon incorporation, which was by an Act passed in 1783, that municipality was vested with the power to make such leases or sales of the marshland which had been dedicated for a common and of other low water lots, as would appear conducive to the welfare of the City.[254] Subsequent statutes made additional grants of submerged areas to the City and also again undertook to vest in the Council the power to lease or sell for "public or commercial" purposes that part of the vacant marshlands and mud flats earlier set apart as a common.[255]

These statutes and the action of the municipality based upon them gave rise to the development of this body of legal doctrine peculiar to

state grants to municipal grantees followed by grants to private parties. The treatment given these grants in the courts may be compared to that in cases involving disputes concerning foreshore and inland submerged lands where state grants to private grantees directly were involved. There the traditional common law concepts of sovereign ownership of all tidal areas with ownership held subject to a public trust (the extent of the trust area having been determined at one time by definitions of navigability), were said to prevail. The legal inquiry in the case of grants by the municipality centered on statutory construction of the governmental grants as though such a governmental entity's only interest in the tidal areas in question were that of a private owner. The notion implicit in the public trust doctrine which would require that municipal grantees take the property impressed with the same trust as the state where tidal areas were concerned was simply not considered.

Any attempt to summarize the present posture of the law of South Carolina concerning ownership of foreshore and inland submerged lands in tidal areas involves reconciling two seemingly conflicting doctrines--one, that these areas of foreshore and submerged lands were considered to be not different from other vacant lands; the other, that special doctrines involving limitations in terms of purpose of use and alienation were applicable where these estuarine areas are involved. Since the Charleston cases do not consider the public trust doctrine as it affects grant of state trust lands, those cases which have done so would seem to

be persuasive, if not controlling authority. This would mean that South Carolina law recognizes a doctrine of trust ownership of tidal areas[256] "for the benefit of the public" and that special rules concerning its alienation are applicable. The strict common law boundary rule is applied to all lands bordering tidal areas. Thus the foreshore of tidal areas remains in the State absent proof of a grant with specific words indicating that the foreshore is also granted (the possibility of proof of that adverse possession which would entitle private claimant to ownership rights in this area is discussed in a later section dealing with adverse possession). In addition, the Farmers Mining limitations on the power of the State to grant submerged lands would apply, i.e., these grants must be for the public welfare, must be made through special legislative act clearly stating legislative intention to grant, and must alienate only such areas which do not impair the estuarine area remaining.[257] In the Charleston cases, it might be noted, there was consideration of whether the grant was conducive to the public welfare of the citizens of Charleston, or "for public or commercial purposes," but there was no consideration of the power of the State in the first instance, to alienate its trust property for such a public purpose. The question of the extent to which tidal foreshore and submerged lands conveyed subject to the trust are limited by public use remains undecided.

In 1924, following this case law development dealing with contested private grants, the foreshore and submerged lands in tidal areas not

previously granted by the State were declared by legislative action to be a common for the taking of fish.[258] In 1957, by virtue of the Attorney General's opinion interpreting this Act, the State announced a policy which recognized in the State no power of alienation of estuarine areas to private grantees unless by special legislation.[259] In keeping with this policy a recent grant by the State to a municipality was a more limited grant, use was required to be for a public purpose and alienation of the granted area was prohibited.[260]

2. Estuarine Waters (of the Foreshore and of Navigable and Non-navigable Waterways)

As a part of the comprehensive Coastal Fisheries Laws enacted in 1924 "[t]he waters and bottoms of the bays, rivers, creeks and marshes within the State or within three miles of any point along low-water mark on the coast" not previously granted by the State were declared to be a common for the taking of fish.[261] Thus, waters of estuarine waterways, coastal marshes and the marginal sea are declared by statute to have remained and be a common if ungranted. Waters of foreshore areas which are not also marsh areas, though not specifically mentioned in the Act, would seem to be included because the term, "bottoms" is defined to include "tidelands of the State covered by water when at the stage of ordinary high tide."[262] While the Act contains no definition of "waters" the assumption would seem warranted that the foreshore waters

which cover tidelands held as a common would be included in this protected category. The Act does provide authority for leasing by the Division of Commercial Fisheries of the Wildlife Resources Commission.[263]

A determination of whether water rights have been "granted" in foreshore tidal waters and waters of navigable and non-navigable waterways depends upon various state rules concerning the right to use of waters. At common law there existed a doctrine of sovereign ownership of these waters together with recognition of a limited right of use by riparians.[264] Under the riparian system of water rights which developed judicially in South Carolina,[265] rights to the use of waters is dependent upon ownership of contiguous land.[266] If the land is granted and its character as riparian is established, rights to the use of the adjoining water follow. As in other riparian jurisdictions, the private right to the use of waters is shared with other riparians and is governed by a judicially evolved standard of "reasonableness" of use.[267] If the water is considered navigable, riparian rights coexist with public rights of use.[268] If non-navigable, the general rule is that the adjoining proprietor owns the bed and water rights to the center of the stream,[269] and only private riparian rights are recognized.

However, the rules just mentioned have developed with respect to non-tidal waters and for several reasons other rules may very well apply in the case of tidal waters. First, the terms "navigable" and

"non-navigable" when used to differentiate those waters in which there are both private and public rights from those where there are only private rights of use, may have different meanings when applied to tidal waters. By statute all streams in South Carolina capable of being navigated by rafts of timber or lumber are said to be "navigable."[270] However, this statute, which was enacted in 1853, was not mentioned in the cases discussing tidal navigability.[271] The most extensive discussion of the latter concept is found in the Farmers Mining case, decided in 1894, where capacity for navigability, regardless of purpose or extent of use, was the accepted test.[272] That definition, which was accepted for purposes of determining bed ownership, might well be considered also applicable for determining water rights in the same tidal area. If this were the case, public rights would exist along with private rights in all tidal waters capable of floatage for commerce or pleasure.

Secondly, no distinction based upon whether the waters are "navigable" or "non-navigable" was recognized at common law in determining the extent of public rights in tidal waters and all tidal waters were considered publicly "owned." Furthermore, if it is assumed that the rule of strict construction with respect to all law in derogation of the common law[273] applies to this situation, a special grant of specific rights in tidal waters also would be necessary if there is to be recognition of greater riparian rights than those limited rights of use recognized at common law.

It should also be noted that while South Carolina is considered to be a "riparian" jurisdiction, statutes have been enacted which authorize "diversions" for certain specified purposes.[274] These authorized diversions are, in effect, permits to use water in certain amounts for "non-riparian" purposes. The right of riparians to recover damages for these diversions is specifically reserved. Apparently, no rights of diversion or grants of this type have been made in estuarine areas.

3. Submerged Lands and Waters of the Marginal Sea

South Carolina's ownership of the submerged lands of its territorial or marginal sea as established by the federal Submerged Lands Act extends to "a line three geographical miles distance from its coast line. . . ."[275] Although the Act defines "coast line" as the line of ordinary low water on the coast and "the line marking the seaward limit of inland waters"[276] it "does not provide adequate criteria for delimiting, with legal and technical certainty, the boundaries of the states."[277] Decisions of the United States Supreme Court have provided that for those states such as South Carolina claiming under the section of the Submerged Lands Act providing for an "unconditional" grant of three geographical miles, the "coast line" marking the State's seaward boundary must be drawn according to definitions in the Convention of the Territorial Sea and the Contiguous Zone.[278] Thus, as was the case with Georgia, even with this clarification difficulties remain in actually

marking South Carolina's boundary in accordance with the provisions of the federal act and doing so will require additional legal and technical clarification.[279]

Since the federal act went into effect South Carolina has by legislative amendments declared its seaward boundary to be that fixed by Congress and also undertaken to fix the lateral sea boundaries between South Carolina and North Carolina, and between South Carolina and Georgia respectively.[280] The amendments provide that this action shall be without effect if Congress does not confirm it and if the states of Georgia and North Carolina do not likewise consent to and adopt the Act's lateral seaward boundaries provisions within a specified time limit.[281] To date, neither the federal government nor either state has taken such action.

Since, under the United States Supreme Court decisions, South Carolina had no rights in submerged lands of the marginal sea before grant under the Submerged Lands Act, no valid title from the State to such submerged lands could exist before the date of the Federal grant.[282] Thus, no pre-1953 title to lands below the line of ordinary low-water mark on the coast and the seaward limit of inland waters could be recognized as valid.[283] Since that date the 1924 statute, which declared tidal submerged land within three miles of any point along low water on the coast to be part of a common for the taking of fish, would

effectively bar alienation of this submerged land except by special legislation.[284]

The history of recognition of the right of use of marginal seawaters, part of which would be considered estuarine waters, was discussed earlier in this study.[285] As indicated there, the Submerged Lands Act, because it abdicated federal claims which had been recognized as paramount, is determinative of a state's proprietary rights in marginal seawaters. Since that Act also vests title and ownership of natural resources within overlying waters of the submerged lands in the state, while reserving certain rights of use of water in the federal government, the statute reasonably can be interpreted as impliedly recognizing that other unreserved rights of use are in the state.[286] To the extent that the Submerged Lands Act confers upon the state rights to use these marginal seawaters, such rights could only be disposed of by the state after the passage of that Act. Since the statute enacted in 1924 also declared such waters were to remain a common for the taking of fish, under present authority, no private rights of use in these marginal seawaters could be obtained without special legislation.[287] There have been no judicial interpretations of the state's proprietary rights in these waters, either before or after the effective date of the federal Act.

C. Legal Doctrines Concerning Ownership and Use in Special Areas

1. Accretion, Reliction, Erosion, Avulsion

(a) General Rule

The general rule at common law was that changes in a shoreline or bank which take place gradually and imperceptibly by accretion, reliction, or erosion cause a change in the boundary, but where the change is sudden the boundary remains as it was before the change.[288] Thus, the riparian retained his right of access where there was gradual change but not where the change was sudden. As the discussion above has indicated, these common law doctrines would be applicable in South Carolina unless changed by statute or the case law development.

Case law in South Carolina indicates recognition of the common law rule of accretions where tidelands are concerned. In Intendant and Wardens v. Charleston and W. C. Ry. Co.,[289] the court asserted that riparian ownership was necessary to vest title to alluvion in the riparian. Specific statutory exception to the common law rule is made for land formed by accretion or reliction on Sullivan's Island, an island off the Charleston coast which is declared by the statute to be State-owned.[290]

Case law has also, seemingly, affirmed the State's adherence to the general common law rule of avulsion. In the case of

Spigener v. Cooner,[291] the court in its discussion of the law declared that where the course of a river is changed suddenly as by violent floods, the old boundary does not change. Nor was it necessary that a change occur all at once to be classified as avulsion. On the facts of the case before it, the court found that a change in the course of a river caused by artificial means--here a man-made cut which formed a new channel for the river--was similar to sudden changes from other causes, and, consequently, the riparian's boundaries remained as they were before.

A recent opinion of the Attorney General of South Carolina[292] has taken the position that the common law doctrine recognizing sovereign ownership of islands formed in tidal areas[293] is a part of the law of that State. The opinion asserts that islands formed from submerged lands below low-water mark in tidal areas together with submerged lands and tidelands are State-owned and are held in trust for the people.[294]

It would thus appear that the common law doctrines of accretion, reliction, erosion and avulsion are a part of the law of South Carolina either because of general acceptance by the State of the common law, or subsequent express recognition by the courts.

(b) Wharfing Out

As a part of the riparian's "right" of access it has frequently been stated that the riparian has a "right" or "privilege" to construct a wharf.[295] Though, as in Georgia, there is statutory regulation of

wharfing out,[296] there is no judicial determination or statutory consideration of the right itself.[297] Thus common law principles would seem to be applicable. There was at common law no unfettered right to construct wharves into tidal waters, but such a use of the area was permissible unless public rights were interfered with.[298] This position seems impliedly adopted in an opinion of the Attorney General of South Carolina which stated that there was no state agency with power to issue a license to build a wharf and noted that: "Such a wharf could not, of course, be built so as to impair the use of a navigable stream or the use of lands belonging to the State of South Carolina."[299]

2. Adverse Possession, Prescription, Dedication

The most common method of acquiring property is by deed or grant. However, under some circumstances, rights in property which may be recognized in the courts can be acquired through use. Adverse possession may be the basis of such a title.[300] South Carolina recognizes, through a combination of case law and statutory development, title by adverse possession which may be acquired on the basis of either of two distinct theories--the common law "presumption of a lost grant" or a theory of "statutory limitation." Title may be established against the state under either of these theories.

The idea underlying the "lost grant" concept is that one in possession must be (or have been) there by virtue of a "grant," and if

he cannot locate written evidence of it, it must have been lost. Ordinarily there is no reason why one claiming on this basis should not have the benefit of presumption that there was such a grant. However, if as in the case of tidal lands, grants of the area would be against the public policy of the state, to indulge in such a presumption would also seem to be contrary to that policy. This approach was adopted by the Supreme Court in the Pacific Guano case.[301] There the court, in considering whether there could be recognition of a claim based upon adverse possession of the beds of tidal navigable streams where the party sought to invoke the presumption of grant, declared no presumption would be recognized because to do so would be contrary to the policy of the state.[302] Other cases have indicated that tidal marsh or foreshore areas also are not susceptible to presumption of grant[303] because to do so would run counter to the common law strict boundary rule which continues to be adhered to in South Carolina.

Turning to a consideration of a claim of title by adverse possession by virtue of the "statutory limitation" doctrine, South Carolina by statute provides that the State is subject to a time limit in recovering its property from another, thus removing the barrier existing at common law to claims against the sovereign based upon adverse possession.[304] The statute in question provides that the State shall not sue by reason of its right or title unless such right or title accrued within the preceding twenty years, or unless the State, or those under whom it claims, shall

have received rents and profits from the land or some part thereof within that period.

There are no decisions which elaborate upon the requirements for a claim against the State based upon adverse possession. Presumably, since an adverse possession claim based upon the statutory limitation, like a similar claim asserted against a private party, is based upon wrongful possession, the judicially developed requirements for successful assertion of the claim against a private party would also be applicable in claims against the State. In controversies between private parties the possession relied upon must be open, notorious, hostile and continuous in the possessor or his ancestor for the whole statutory period.[305] What acts (other than cultivation of the estuarine area) would satisfy the requirements of this doctrine where tidal marsh or submerged lands are involved has not been established.[306]

At least theoretically, the State may acquire title by adverse possession under the "statutory limitations" rule in the same manner as private persons.[307] The period of possession required by one statute is ten years, and by a second, forty years,[308] and in each instance "the possession must be actual, open, notorious, hostile, continuous and exclusive for the whole statutory period."[309] Under the ten year statute, whether the possession is claimed with or without written instrument is relevant to a determination of the amount of land adversely held.[310] The forty year statute of limitations in South

Carolina provides that "[n]o action shall be commenced in any case" for land against one in adverse possession under claim of written instrument unless the claimant was in possession within forty years before the action.[311] The latter has been said to be "a statute of repose, which will not be allayed by any personal disabilities, such as infancy, etc., on the part of the landowner."[312] Such a disability of the landowner may affect the acquisition of rights under the ten year statute of limitations.[313]

By Constitutional provision the legislature can confirm title to lands claimed by the State, to individuals or other parties who claim by adverse possession.[314] This provision has been interpreted by the Attorney General to mean the validation or confirmation of an existing grant or claim.[315] Opinions of the Attorney General have indicated that payment of taxes on an area of tidal marsh does not form the basis of a claim sufficient to warrant such confirmation by the legislature.[316]

"Prescription" is recognized as a method of acquiring rights, or, to use the legal term, an "easement," in land of another (as distinct from title to land of another) through use. In South Carolina the doctrine has developed judicially. The State Supreme Court has said that "[t]o establish a right by prescription, it is necessary to prove three things: (1) the continued and uninterrupted use or enjoyment of the right for the full period of twenty years; (2) the identity of the thing enjoyed; (3) that the use or enjoyment was adverse, or under claim of right."[317] Where it appears that a person has enjoyed the use openly, notoriously,

continuously and uninterruptedly in derogation of another's rights for the twenty year period, the use will be considered adverse and the burden is on the other party to rebut this presumption.[318] Use by either express or implied permission cannot ripen into an easement by prescription. If the possession is permissive in its inception, it will continue to be so regarded "until there is a distinct and positive assertion of a right hostile to the owner."[319]

A prescriptive right to use of water may be acquired by such an adverse use for twenty years, and, it has been held, it is not necessary to show the amount of water used each year by the riparian to establish such prescriptive rights.[320] The cases have recognized that the public, also, may acquire rights by prescription. Use by the public for over twenty years of a small waterway through the plaintiff's lands was found to create a prescriptive right in the public.[321]

As with prescription, recognition of rights by "dedication" is entirely a matter of case law. However, there have apparently been no cases dealing specifically with estuarine areas. Generally, dedication has been held to be an "intentional appropriation of land, or of an easement therein, for some public purpose."[322] Dedication can only be made to the public,[323] and there must be acceptance by the public within a reasonable time.[324] There also must be evidence of a clear intention to dedicate and "[i]n the absence of an expressed gift, one who asserts a dedication must show conduct on the part of the landowner

clearly, convincingly and unequivocally indicating his intention to create a right in the public . . . adversely to him. . . ."[325] If the purpose of the dedication is limited, this restriction will be enforced.[326] However, if the dedication is general and unrestricted, the fact that property has been devoted to one public use does not prevent its change to another public use by proper legal authority.[327]

3. Ownership and Use of Certain Natural Resources

Because of its multi-dimensional nature, a variety of natural resources are to be found in the estuary. Some of these require separate legal treatment.

By statute there is recognition of the common law rule that the ownership of fish, game, and wild birds, classified as ferae naturae, is in the State.[328] "Their ownership . . . is in the state in its sovereign capacity as the representative and for the benefit of all its people in common."[329] When wild animals or fish are reduced to possession legally, title passes to the private individual involved.[330]

The question of the right of the public, subject to regulation, to hunt and fish in estuarine areas has arisen on several occasions. An early case, McCullough v. Wall,[331] declared that there is a common right belonging to every citizen to fish in navigable or tidal waters. And in 1924 with the enactment of the Coastal Fisheries Act, estuarine waters were declared to "continue and remain" a common for the taking of fish;

an exception from the common was recognized for any area which had been previously lawfully granted.[332] There is also authority for the proposition that the public has a right to hunt in tidal areas not granted.[333] It may be that the right to these resources in tidal waters is governed by the rules which control rights in the waters themselves on the assumption that they determine whether rights in the common have been granted. If tidal waters are considered to be subject to the same judicially developed doctrines of riparian rights as apply to other waters, equivalent private rights would attach to those estuarine areas which are recognized as having been granted and the resources found there.[334] However, if rights in tidal waters (other than those exceptions recognized at common law) are governed by different rules, then one asserting rights to these resources would have to rely upon these rules.[335]

Oysters have been classified as ferae naturae, though not migratory, and are considered among those resources which are held in common.[336] However, planted shellfish do not qualify as ferae naturae. The South Carolina "Coastal Fisheries Act" includes shellfish, mobile and immobile, in its definition of "fish." By its terms, estuarine areas remain a common for the taking of shellfish except for those areas previously lawfully granted, and areas which are leased. Future grant of oyster beds for private ownership purposes is specifically forbidden, except by special legislative enactment.[337]

South Carolina has important estuarine mineral resources. Among these are clay, sand and gravel, heavy minerals, coquina, marl, limestone, phosphate deposits, and oil and gas.[338] As a general rule the ownership of minerals follows title to the land.[339] South Carolina case law clearly indicates that the riparian on tidal waters, who does not have title to foreshore or submerged lands, has no mineral rights in these areas.[340] Accordingly, there is no right to mine in State-owned areas as a riparian or as a member of the public. Proof of a specific grant of estuarine land to the riparian claimant would be needed to establish mineral rights in these lands, and if the special limitations concerning private grant of public lands are applied here, specific grant of mineral rights also would be needed.[341]

The pattern of statutory control indicates a policy of continued state ownership of its mineral resources. The general statute providing authority for sale of land owned by the state expressly excepts from this authority "any property held in trust for a specific purpose by the State or the property of the State in the phosphate rocks or phosphatic deposits in the beds of the navigable streams and waters and marshes of the State."[342] Opinions of the Attorney General have interpreted this Act as preventing the sale by the State Budget and Control Board of lands such as marshlands and submerged lands held in trust for public uses.[343]

D. Statutory Regulation in South Carolina

At this point in the treatment of the law of Georgia some background material was developed concerning the legal bases for state statutory controls of the estuarine area. As explained there, the existence of private "interests" or "ownership" does not prevent state control by virtue of exercise of its police powers, its power of eminent domain, and by discharge of its responsibilities under the trust doctrine. At this point there should be recourse to that discussion which is equally pertinent to this consideration of South Carolina law.[344]

There is at present no general regulatory legislation providing for the protection and management of estuarine areas in South Carolina.[345] The recently created South Carolina Water Resources Commission was empowered to develop a plan for "the maximum beneficial multiple-use and management of the tidelands and coastal waters of South Carolina."[346] The Commission's report, released in early 1970, includes extensive recommendations for conservation and management of South Carolina tideland.[347] These have not, however, been acted upon by the Legislature.

The South Carolina Wildlife Resources Department is empowered to acquire estuarine areas for game reserves[348] and has acquired several areas of coastal marshland for waterfowl hunting.[349] It also has jurisdiction, through its Division of Commercial Fisheries, over

all fish in tidal waters.[350]

In addition, there are a number of statutes which directly or potentially affect estuarine areas. They include statutes giving broad powers of acquisition, regulation and development of certain estuarine areas to the State Ports Authority,[351] the Public Service Authority,[352] certain city port and terminal commissions[353] and to certain municipalities for purposes of various "Water-Front Improvement" activities.[354] There are at least three statutes providing for the draining or filling of tidal swamp as a health measure.[355] Soil and Water Conservation Districts have the power to formulate land use regulation for soil and water conservation which are enforceable after compliance with certain formalities.[356] The Low Country Resources Conservation and Development Authority, comprising six of the eight "low country" counties in South Carolina, has power, through land acquisition and waterway improvement, to conserve and develop natural resources of the area.[357]

At this juncture in the development of the law of South Carolina it is apparent that, while there are evidences of planning for comprehensive control of the use of the estuarine area, present statutory control is fragmented and scattered among a number of agencies with differing, and often conflicting powers and objectives.

FOOTNOTES

FOOTNOTES

[1]See E. Odum, Fundamentals of Ecology 352 (3rd ed. 1971); The Georgia Coast: Issues and Options for Recreation v (1971) (The Conservation Foundation, Washington, D. C.).

[2]Little research has been conducted into the feasibility of reconstructing salt marshlands. M. Heath, Jr., State Programs for State Estuarine Conservation 4 (Inst. of Gov't Univ. of N. C. 1968).

[3]Address by Eugene P. Odum, Second Sea Grant Conference, Univ. of R. I., 1968.

[4]The First Annual Report of the Council on Environmental Quality 176 (1970).

[5]National Council on Marine Resources and Engineering Development, Marine Science Affairs--Selecting Priority Programs 47 (4th Ann. Rep. 1970). Though recreational development may aid preservation of the estuarine environment, overuse and poorly planned use will adversely affect conservation efforts. See Hardin, The Tragedy of the Commons, 162 Science 1243 (Dec. 13, 1968).

[6]Though it is recognized that pollution, chiefly resulting in chemical alteration, is one of the most destructive factors affecting the estuarine environment, because it is a part of the larger problem of water pollution generally, it is not dealt with in this study.

[7]1 Commission on Marine Science, Engineering and Resources, Science and Environment III-39 (1969).

[8]G. Spinner, A Plan for the Marine Resources of the Atlantic Coastal Zone 37 (1969).

[9]Id. at 53.

[10]See Estuaries (G. Lauff ed. 1967).

[11]E. Pritchard, Estuaries 3 (G. Lauff ed. 1967).

[12]E. Odum, supra note 1, at 352.

[13]Tide elevations can be ascertained by use of Coast and Geodetic Survey bench marks. See 2 A. Shalowitz, Shore and Sea Boundaries 60-61 (1962). In ascertaining the tide-elevation range in each state, that is the range from sea level to the upper estuarine limit, the determinative factors would be a salinity survey, investigation of types of vegetation and tidal observation. Using these factors as guidelines the upper estuarine limit could be arbitrarily designated as all tidally influenced waters, beds, marshes and marshland within a certain tide-elevation range. See Georgia's Coastal Marshlands Protection Act of 1970, Ga. Code Ann. §45-137(b) (Supp. 1970), where tide elevation from "mean tide level" is used to define "estuarine area". New devices as the A. O. Goldberg Refractometer which permits accurate salinity determinations in the field at low cost and new techniques as those used in infrared photography to map vegetation, make the gathering of information about these factors more readily obtainable than was possible in the past. See Behrens, Use of the Goldberg Refractometer as a Salinometer for Biological and Geological Field Work, 23 Jnl. of Marine Research 165 (1965); Lear, Infrared Exploration--New Light on the Environment, 54 Sat. Rev. 53 (Apr. 3, 1971).

[14]H. Caspers, Estuaries 7 (G.Lauff ed. 1967). This latter determination is not as important for the legal study of ownership and control as present legal authority clearly recognized state ownership seaward from a state's "coast line" out to a certain jurisdictional limit, with the 1953 enactment of the Submerged Lands Act. See text accompanying notes 84-88 infra. State alienation since 1953 because of increased awareness of importance of estuarine areas, has been limited.

[15]This study does not consider rights in ground waters in estuarine areas.

[16]See Lauer, The Riparian Right As Property in Water Resources and the Law 133, 154-55, 177-78 (1958); Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 473, 476 (1970).

[17]2 Bracton, On the Laws & Customs of England 39-40 (S. Thorne transl. 1968); 1 H. Farnham, The Law of Waters and Water Rights 165-66 (1904) [hereinafter cited as Farnham]; Lauer, The Common Law Background of the Riparian Doctrine, 28 Mo. L. Rev. 60, 64-72 (1963).

[18]1 Farnham 171; Fraser, Title to the Soil Under Public Waters, 2 Minn. L. Rev. 313, 315 (1918).

[19]Hall, On the Sea-shore, as reprinted in Stuart A. Moore, A History of the Foreshore 668-72 (3rd ed. 1888) [hereinafter cited as Moore]; 1 Farnham 167-68, 182.

[20]Moore 180 et. seq.

[21]Moore XL; Stone, Public Rights in Water Uses in R. Clark, 1 Waters and Water Rights 191 (1967) [hereinafter cited as Clark]; Harnsberger, Eminent Domain and Water in 4 id. 101-04 (1970); 1 Farnham 167-68, 181-84.

[22]See Attorney-General v. Philpott (1631), as reprinted in Moore Appendix I (which was the first decree in favor of the Crown based on this doctrine. Fraser, supra note 18, at 318); Attorney-General v. Burridge, 147 Eng. Rep. 335, 342 (Ex. 1822) ("It is a doctrine of ancient establishment, that the shore between the high and low-water marks belongs prima facie to the King".) See list of cases adopting this rule in Moore 651 n. 1; also see Harnsberger, 4 Clark 102.

[23]1 Farnham 168-69. It should be noted that neither of these theories affected title to lands owned by Crown grant or prescription, if specific grant or usage could be proved. See Hale, De Jure Maris, as reprinted in Moore 384-92.

[24]1 Farnham 169-70.

[25]The Crown Lands Act, 1 Anne, c. 7, §5 (1702), 3 Halsbury's Statutes of England 214 (1929); see Harnsberger, 4 Clark 103 where it is stated, "in the common law it developed that both the jus publicum, the public rights of use, and the jus privatum, the private rights of use and enjoyment, became inalienable on the part of the Crown. The jus publicum had been inalienable for centuries and the jus privatum became so by acts of Parliament and by custom."

[26]Stone, 1 Clark 191.

[27]Hall, supra note 19, at 669.

[28]Harnsberger, 4 Clark 103.

[29]1 Farnham 110; Stone, 1 Clark 191; Harnsberger, 4 Clark 103; Fraser, supra note 18, at 327.

[30]Lauer, supra note 17, at 90.

[31] Confusion resulted in the development of the common law of this period when the term, "navigable", was treated as synonymous with "tidal". This confusion seems largely traceable to an early case, The Royal Piscarie of the Banne, 80 Eng. Rep. 540 (K. B. 1604), which involved a dispute as to fishery rights in part of the tidal river, Banne. See 2 A. Shalowitz, Shore and Sea Boundaries 518-21 (1962). The court in the course of its opinion in that case classified rivers as navigable and non-navigable but concerned itself principally with "navigable tidal rivers" and "inland non-navigable rivers" in reaching the conclusion that the river Banne "as high as the sea flows and reflows is a royal river." This appears to have led to the inference on the part of some that the latter were the only types of rivers and to the equating of "navigable" with tidal waters and "non-navigable" with inland waters. However, Lord Hale's Treatise of 1667 treated both fresh and salt water rivers as "navigable" under the English law of this period, --"there be other rivers, as well fresh and salt, that are of common or publick use for carriage of boats and lighters." Hale, De Jure Maris, as reprinted in Moore 374. In addition, extensive early authority "that navigable water is not synonymous with . . . tide water" is referred to in Farnham's treatise. See, e. g., 1 Farnham 112-17. Despite these latter authorities the assumption that navigable waters and tidal waters were interchangeable terms in English law became embedded in much of early American law. Responsibility for this is attributed to Chancellor Kent because of his version of the early law in Palmer v. Mulligan, 3 Caines 307, 2 Am. Dec. 270 (N. Y. 1805), and its general acceptance has been attributed to the popularity of his Commentaries in which he took the same position. 1 Farnham 104. A result of this development was the assumption that the jus publicum character of waters and underlying beds was considered to be determined not by their tidal characteristic but by the characteristic of navigability of the waters involved.

The term "navigability" has posed definitional problems in a number of contexts and the definition adopted often varies with the character of the interest involved, e. g., title purposes, right of use purposes, etc. In some instances where the definition would determine ownership of tidal areas, "navigable" has been defined as including all tidal waters and navigable waters. See Submerged Lands Act, 43 U. S. C. §1301(a) (1964). To provide a distinction between the situations where it was assumed that all tidal waters were navigable and use of the term to mean capacity for boating, rafting of logs, etc., the terms "navigable at law" and "navigable in fact" were adopted. Harnsberger, 4 Clark 103-08.

[32] Hale, De Jure Maris, as reprinted in Moore 374; Harnsberger, 4 Clark 105-08.

[33] 2 Farnham 1364; Stone, 1 Clark 181-82. The status of other public trust rights which existed at the common law of this period as a right of passage, a right in ports, a right to sand, gravel and to seaweed are discussed in Note, The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine, 79 Yale L. J. 762 (1970).

[34] 2 Farnham 1365.

[35] See, e.g., West v. Baumgartner, cas. nos. 45908-13, --Ga. App. --(1971) petition for cert. filed, Sup. Ct. of Ga. (Aug. 20, 1971) (No. 26795), where court in discussing the public right of fishery in tidal waters quotes approvingly from Moore 710: "[w]hether in fact, it was originally a public grant from the King, or whether it was a reservation by the people of such right, when they vested the rest of the property in the sea in him, or whether it be one of those natural and necessary rights which, like the air we breathe, has ever been free and unquestioned in enjoyment, is immaterial." See Note, The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine, 79 Yale L. J. 762, 769 (1970).

[36] 1 Farnham §§62-63; see Lauer, supra note 17, at 91-95; see Ma s and Zobel, Anglo-American Water Law: Who Appropriated the Riparian Doctrine?, 10 Public Policy 109 (1960).

[37] Riparian is used in this study to mean the upland water bordering water. The word "riparian" technically is defined as the upland owner on a stream as opposed to the term "littoral" which refers to the proprietor abutting on a sea or lake. See Black's Law Dictionary 1083 (4th ed. 1951). However, since the words are frequently used co-extensively, for purposes of this study no differentiation by use of this terminology is made.

[38] Sury v. Pigot, 79 Eng. Rep. 1263 (K. B. 1625); see 1 Clark 288.

[39] 3 Blackstone, Commentaries 216-18 (7th ed. 1775); Lauer, supra note 17, at 96.

[40] Brown v. Best, 95 Eng. Rep. 557 (K. B. 1774); see Cox v. Matthews, 86 Eng. Rep. 159 (K. B. 1673) (Lord Hale by dicta in this opinion declared that only through defendant's previous use--"used to turn the stream as he saw cause"--could plaintiff's use, though newly begun, be defeated.) While it was difficult to determine what fact situations would lead to a finding of a right acquired by prescription, there were adjudications upholding the acquisition of such a right by the riparian in this manner. The law in this early period was in the process of transition from a requirement of ancient use (a use which had existed time out of mind) to acceptance of prior use as establishing prescriptive rights.

Later, Blackstone in his Commentaries used the term "occupancy" to describe the prerequisite for recognition of the right. See 2 Blackstone, supra note 39 at 402-03. The meaning of this term has been the subject of much discussion. Recent writing by legal scholars suggests that the early English law did not recognize "prior appropriation" as a method of acquiring rights in waters in the sense that this term has been used in American law in dealing with this concept. See 1 Clark 289 n. 25; Lauer, supra note 17, at 96-99; Maas and Zobel, supra note 36, at 124-30.

[41] 2 Blackstone, supra note 39, at 261-62; Hale, De Jure Maris, as reprinted in Moore 380.

[42] 1 Farnham §63. It should be noted that because the building of wharves by riparians was formerly thought of as a public convenience this activity was usually permitted; however, a wharf into tidal waters without a license could be regarded as an encroachment upon the sovereign property. Weber v. Bd. of State Harbor Comm'rs, 85 U.S. (18 Wall) 57, 65 (1873); 1 Farnham §113; see S. Plager & F. Maloney, Controlling Waterfront Development 3, 4 (Pub. Adm. Clearing Serv., Univ. of Fla., Studies in Pub. Adm., No. 30 (1968).

[43] The American colonies were considered by England to be lands claimed by right of occupancy or discovery; accordingly, the colonists carried with them the law of England as far as it was applicable in their new situation. See J. Story, Commentaries on the Constitution of the United States §§152-57 (5th ed. M. Bigelow 1891).

[44] Charters of Provinces of North America (1766); 1 C. Jones, The History of Georgia 87-95 (1883).

[45] W. McElreath, A Treatise on the Constitution of Georgia 17 (1912).

[46] 1 Blackstone, supra note 39, at 108.

[47] See D. Rice, Estuarine Lands of North Carolina: Legal Aspects of Ownership, Use and Control 14-15 (Inst. of Gov't Univ. of N. C. 1968).

[48] Shively v. Bowlby, 152 U.S. 1, 14-15 (1894).

[49] Act of November 15, 1778, Watkins & Watkins, Digest of the Laws of the State of Georgia 231-32 (1800). This Act was to remain in force until the end of the next legislative session. In 1781 there was a similar revival act, Act of August 21, 1781, id. at 239, and in 1783 a more general revival act, providing that laws passed before December, 1778, which were or might be expiring and were not repugnant to the Constitution of the State were to continue in force until repealed. Act of

July 30, 1783, id. at 280-82.

[50]Act of February 25, 1784, Watkins & Watkins, Digest of the Laws of the State of Georgia 289-90 (1800).

[51]Young v. Harrison, 6 Ga. 130, 142 (1849).

[52]Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902).

[53]Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902). There has been no judicial definition in Georgia of "high-water mark," the term used in the Johnson case to indicate the boundary of trust property. Since in addition, the English common law was not clear in its delimitation of the upper tideland boundary (1 A. Shalowitz, supra note 31, at 90-91; see discussion in Teclaff, The Coastal Zone--Control over Encroachments into the Tidelands, 1 J. Mar. L. & Com. 241, 256 (1970)), this tideland boundary delineation is judicially undetermined. However, with the definition of estuarine area in the recent Coastal Marshlands Protection Act (Ga. Code Ann. §45-137(b) (Supp. 1970)) in terms of tidal elevation, the tidal area apparently includes areas both daily and periodically flowed by the tide. Thus, there would seem to be legislative determination of a boundary which includes certain periodic as well as daily tides.

[54]Mayor & Aldermen v. State, 4 Ga. 26 (1848). Among the restraints dealt with in the case is that on the power of the State to control navigation in light of the paramount federal power in this area, but this "restraint" on state power is not relevant to the discussion here.

[55]Id. at 39-40. See note 66 infra.

[56]Id. at 36.

[57]Id. at 46.

[58]In June, 1777, an Act for opening the Land Office was passed with the purpose of settling "vacant lands." Act of June 7, 1777, Watkins & Watkins, Digest of the Laws of the State of Georgia 203-05 (1800). There followed a series of acts concerning the land office and the granting of vacant lands. Act of September 16, 1777, id. at 205-06; Act of January 23, 1780, id. at 232-37; Act of February, 1783, id. at 258-65; Act of August 1, 1783, id. at 286-87; Act of May 11, 1803, Clayton, Laws of Georgia 1801-1810, at 100-07 (1812). There was, in addition, recognition by colonial and state governments of lawful grants and allotments

of the preceding government. See Act of March 15, 1758, Watkins & Watkins, Digest of the Laws of the State of Georgia 54-56 (1800); Act of June 7, 1777, Cobb, Digest of the Statute Laws of the State of Georgia 660-62 (1851).

[59] 114 Ga. 790, 40 S.E. 807 (1902).

[60] The only other early laws discovered dealing specifically with estuarine areas relate to oyster rights or regulate the taking of terrapins and turtles in certain seasons. Act of February 18, 1856, Duncan, Georgia Laws 1855-56, at 13-14 (1856). The first section of this Act provides protection for the adjoining landowner of banks or shore where he plants and stakes the area.

[61] 4 Ga. 26 (1848).

[62] §3 of the 1902 Boundaries of Lands on Tide-Waters Act, 1902 Ga. L. 108 [Ga. Code Ann. §85-1309 (1970)]; Ga. Const. art. I, §VI, ¶1. The constitutional provision is worded in terms of "ownership of lands abutting on tidal water ...." Id.

[63] §1 of the 1902 Boundaries of Lands on Tide-Waters Act, 1902 Ga. L. 108 [Ga. Code Ann. §85-1307 (1970)] (If the water is the dividing line, then the boundary of the owner adjoining non-navigable tidewater extends to the center of the channel. Id.) If the land is considered as adjoining salt or tidal marsh, this difference in terminology may mean that the "grant" does not include the tidal marsh. Compare Oemler v. Green, 134 Ga. 198, 67 S.E. 433 (1910), with Prey v. Oemler, 120 Ga. 223, 47 S.E. 546 (1904). For discussion of this point of statutory construction, see Bolton, Legal Ramifications of Various Applications and Proposals Relative to the Development of Georgia's Coastal Marshes 10 (March, 1970) (unpublished opinion of Georgia Attorney General). But see Note, Regulation and Ownership of the Marshlands: The Georgia Marshlands Act, 5 Ga. L. Rev. 563, 575 (1971).

[64] It should be noted that for purposes of this Act "navigable tidewater" is any tidewater or bed where the tide ebbs and flows regularly which in fact is used for purposes of navigation or is capable at mean low tide of bearing boats loaded with freight in the regular course of trade. §2 of the 1902 Boundaries of Lands on Tide-Waters Act, 1902 Ga. L. 108 [Ga. Code Ann. §85-1308 (1970)]. These definitions of navigation are used for purposes of distinguishing tidewaters in which riparian rights are limited to foreshore areas from those in which "title" to the bed is considered granted to the riparian.

[65]Ga. Code Ann. §85-1309 (1970).

[66]See Note, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L. J. 762, 775 (1970); in Mayor & Aldermen v. State, 4 Ga. 26 (1848), Judge Lumpkin made the statement that the public right of navigation could be extinguished at common law. It is clear from a reading of the case that abrogation of the right was not contemplated but only a contraction necessary for regulation of the navigation right and "extinguish" was mentioned only in the sense that any regulation prevents some use. The Court found the regulation in question, which pertained to wharves, to be in aid of navigation. In addition, the right of "wharfing out" is generally considered one of the alienable rights when it does not conflict with, but rather effectuates the purpose of the public trust concept. See 1 Farnham §113.

[67]Confirmation of these public rights might well be considered as comprehending public uses such as fishing, pleasure boating, wading, swimming, fowling and hunting. These public uses have been recognized in other jurisdictions. See Lamprey v. Metcalf, 52 Minn. 181, 199, 53 N. W. 1139, 1143 (1893) (where comparable rights were considered to be an extension of the navigation easement); Gaudet, Water Recreation--Public Use of "Private" Waters, 52 Calif. L. Rev. 171 (1964). On the other hand, retention of these rights in the public severely limits the private right of use. For instance, such uses as dredging and filling, or mining for phosphate, readily could be interpreted as preventing the free use of these tidewaters for passage and the navigation specified. See Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P. 2d 232 (1969), cert. denied, 400 U. S. 878 (1970), where defendant riparian was ordered to remove fill from foreshore area (area seasonally inundated) because it interfered with public rights in navigable waters. The court in that case stated:

> Thus, in the situation of a naturally varying water level, the respective rights of the public and of the owners of the periodically submerged lands are dependent upon the level of the water. As the level rises, the rights of the public to use the water increase since the area of water increases; correspondingly, the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights. As the level and the area of the water decreases, the rights of the public decrease .... Id. at 315, 462 P. 2d at 238.

When these interests initially were recognized at common law, navigation and fishing were usually involved and as a consequence the law developed

around express recognition of those uses. However, the fact that, historically, certain uses were protected should not prevent the term from comprehending other public uses where these easements or uses are grounded in the doctrine of public trust interests. See Stone, 1 Clark 201-02.

[68]114 Ga. 790, 40 S.E. 807 (1902).

[69]2 A. Saye, Records of Constitutional Commission 1943-44, at 360-61 (1946).

[70]Prey v. Oemler, 120 Ga. 223, 47 S.E. 546 (1904); Rauers v. Persons, 144 Ga. 23, 86 S.E. 244 (1915). Though Aiken v. Wallace, 134 Ga. 873, 68 S.E. 937 (1910), also concerned rights granted under this 1902 Act, its determination that title to a foreshore area was not divested by the Act involved a controversy between private parties, where there was no claim of public right.

[71]Prey v. Oemler, 120 Ga. 223, 224, 47 S.E. 546 (1904).

[72]Rauers v. Persons, 144 Ga. 23, 25, 86 S.E. 244, 245 (1915).

[73]Dicta in a recent decision of the Georgia Court of Appeals has indicated that since there was a Constitutional ratification of the 1902 Act it is unnecessary to determine "whether the State's right in the land and the waters was a proprietary interest or was in trust for the benefit of the public, which may involve different rights in the State." West v. Baumgartner, cas. nos. 45908-13, --Ga. App. --(1971) petition for Cert. filed, Sup. Ct. of Ga. (Aug. 20, 1971) (No. 26795). This would seem to be precisely the question which needs judicial determination. See Bolton, Legal Ramifications of Various Applications and Proposals Relative to the Development of Georgia's Coastal Marshes (March, 1970) (unpublished opinion of Georgia Attorney General). But see Abbott, Some Legal Problems Involved in Saving Georgia's Marshlands, 7 Ga. St. B.J. 27 (1970). Constitutional ratification of the statute was considered necessary because the Constitution of Georgia prohibited grants or donations to private individuals by the Legislature. Ga. Const. art. VII, §XVI, ¶I (1877); now Ga. Const. art. VII, §1, ¶II. Relevant in construing a constitutional provision is the principle that recourse may be had to the proceedings which drafted the instrument. The records of the Constitutional Commission which drafted the 1945 Constitution indicate that this property was considered vested in the public, and the 1902 Act which undertook to extend riparian ownership abutting tidal water was considered in violation of the constitutional provision preventing the

granting of state property. 2 A. Saye, Records of Constitutional Commission 1943-44, at 360-63 (1946). There are various principles which are resorted to, to determine whether a statute in conflict with the constitution may be validated by a constitutional provision subsequently adopted. The general rule is that where such unconstitutional statutes are "ratified" by a constitutional amendment, or by provision expressly or impliedly ratifying or confirming them, the action is ineffective if validation would divest a vested right. See 16 Am. Jur. 2d Constitutional Law §180. That vested public rights were thought to be involved is apparent from a reading of the decision of the Supreme Court of Georgia handed down in 1902, in Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902). That case considered the question of ownership of the foreshore and determined that the common law rule of foreshore ownership in the sovereign, absent "special title or grant," still existed in the State of Georgia, thus making this area between high and low-water mark where special grant or title was unproven, public property. If this reasoning is accepted and the general public is viewed as a property holder, a claim may be made on constitutional grounds that such a taking of land belonging to the public is comparable to a wrongful taking of private property. As a treatise writer recently has stated, "no state . has adhered to the view that the public interest [in tidal areas] may be alienated in fee to private persons without regard to the utility and need of the property for navigation, and without assurance that the property will be used to promote at least a quasi-public purpose such as railroad transportation or municipal use." Stone, 1 Clark 196. Thus, if this tidal area of waters and lands were public trust property, alienation in fee would be questionable. It should be recognized that a constitutional restraint which in effect bars a gift or transfer for private purposes of public lands or waters in a particular resource category is different from a claim of constitutional prohibition, preventing resource reallocation--that is a change from one public use to another public use. See Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 473, 481 n. 32 (1970).

[74] See discussion in text at notes 60-61 supra.

[75] West v. Baumgartner, cas. nos. 45908-13, --Ga. App. --(1971), petition for cert. filed, Sup. Ct. of Ga. (Aug. 20, 1971) (No. 26795).

[76] Id. It should be noted that since the 1902 Tidelands Act did not purport to deal with bed ownership or overlying waters of the "navigable" tidewater (see Ga. Code Ann. §85-1309 (1970)), rights in these "navigable" tidal waters remain in sovereign ownership as at common law, regardless of construction of the 1902 Act.

[77]See text accompanying notes 36-42 supra. In Georgia, the riparian's right to gain by prescription a larger right of use than his natural right would not be applicable to tidal waters because prescriptive rights cannot run against the state. See note 139 infra.

[78]A developed body of "riparian" water law was adopted judicially in Georgia in 1884 (see R. Kates, Georgia Water Law 24 (1969)), and the Georgia courts have continued to recognize this right to certain uses by the upland owner as deriving from ownership of the banks even though there is also authority to the effect that such rights are dependent upon ownership of the underlying soil. See Ga. Code Ann. §85-1301 (1970); Kates, supra, at 30; Rome Ry. & Light Co. v. Loeb, 141 Ga. 202, 207, 80 S.E. 785, 787 (1914); Moulton v. Buntin McWilliams Post No. 658, 213 Ga. 859, 861, 102 S.E.2d 593, 595 (1958). Authority for the latter proposition is found in an 1860 code section (Ga. Code §2206 (1860), now Ga. Code Ann. §85-1301 (1970)) which ties the right to use the water in question to ownership of the underlying soil and delimits the rights of this "owner" in that he may not divert nor may he use it so as to interfere with the enjoyment of the next owner, thus recognizing a common right of use with other riparians. These court decisions and statutes were developed in terms of waters above the ebb and flow of the tide. See Hendrick v. Cook, 4 Ga. 241, 255 (1848); Jones v. Water Lot Co., 18 Ga. 539 (1855).

[79]See Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902); West v. Baumgartner, cas. nos. 45908-13, --Ga. App.--(1971) petition for cert. filed, Sup. Ct. of Ga. (Aug. 20, 1971) (No. 26795). Ga. Code Ann. §§85-1303, -1305 (1970) were specifically declared by the Johnson and West courts to be inapplicable to tidewaters. In addition, in view of the strict construction of law in derogation of the common law codifications of judicially developed rules pertaining to non-tidal waters (Ga. Code Ann. §§85-1301 (1970), 105-1407 (1968) would be inapplicable to tidal waters.

[80]See note 77 supra. There is separate treatment of riparian rights in natural resources found in tidal waters. See text accompanying notes 147-67 infra.

[81]Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). See list of cases cited for this proposition in United States v. Louisiana, 363 U.S. 1, 16 n. 12 (1960).

[82]United States v. Louisiana, 363 U.S. 1, 16 (1960).

[83]United States v. California, 332 U.S. 19 (1947).

[84]43 U.S.C. §§1301-1315 (1964).

[85]Id. §§1311-1315.

[86]Id. §1301.

[87]Id. §§1301(c), 1311-1315; Ga. Code Ann. §15-101 (Supp. 1970).

[88]See United States v. Louisiana, 363 U.S. 1, 77 (1960), where the Court stated "except as granted by Congress, the States do not own the lands beneath the marginal seas." However, in pending litigation the State of Georgia, along with other Atlantic coast states, is claiming rights in the marginal sea beyond the three mile limit as successors to the grantees of the British Crown. This claim is made independently of the Submerged Lands Act and is made to the extent of seaward limit of United States' national jurisdiction. See Lewis, A Capsule History and the Present Status of the Tidelands Controversy, 3 Nat. Res. Law. 620, 629 (1970). The litigation involved concerns the granting of the United States' motion for leave to file a bill of complaint against the Atlantic coast states which would seek recognition of exclusive Federal sovereign rights in this area. United States v. Maine, 395 U.S. 955 (1969). The case has been referred to a Special Master for further proceedings. United States v. Maine, 398 U.S. 947 (1970).

[89]43 U.S.C. §1301(c) (1964).

[90]1 A. Shalowitz, supra note 31, at 155.

[91] There exist three different types of tides along the coastal states. The Atlantic Coast has two almost equal daily low and high tides. The Gulf Coast usually has only one daily high and low tide. So for these two shorelines the ascertaining of ordinary low-water mark would usually create little problem. But along the Pacific shore there are two high waters and two low waters per day with a "high degree of inequality between successive highs and successive lows." Comment, Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem, 6 San Diego L. Rev. 447, 451 (1969).

[92]43 U.S.C. §1301(c) (1964).

[93]United States v. California, 381 U.S. 139 (1965); United States v. Louisiana, 394 U.S. 11 (1969).

[94]Apr. 29, 1958, [1964] 15 U.S.T. 1607, T.I.A.S. No. 5639. It is interesting to note that the Court in adopting Convention definitions for purposes of interpreting the Submerged Lands Act was adopting definitions written 5 years after passage of the latter.

[95]United States v. Louisiana, 394 U.S. 11, 34 (1969).

[96]United States v. Louisiana, 389 U.S. 155, 156 (1967).

[97]Ga. Code Ann. §15-101 (Supp. 1970).

[98]See United States v. Louisiana, 398 U.S. 155 (1967).

[99]United States v. Louisiana, 394 U.S. 1, 5 (1969); accord United States v. Louisiana, 394 U.S. 11 (1969). (It had been argued in this case that because the Louisiana coast is constantly changing whereas the California coast is rock-bound and relatively straight, different rules should apply. The Court stated, "that if the inconvenience of an ambulatory coastline proves to be substantial," the remedy is to be sought either in the Congress or in agreement between the parties. Id. at 34.)

[100]United States v. California, 382 U.S. 448, 449 (1969).

[101]See 1 A. Shalowitz, supra note 31, at 165-68.

[102]See United States v. Louisiana, 394 U.S. 11, 72-73 (1969).

[103]394 U.S. 11, 65 (1969).

[104]Id. at 65 n. 85, quoting from a memorandum of April 18, 1961, excerpted in 1 A. Shalowitz, supra note 31, at 161 n. 125.

[105]United States v. Louisiana, 394 U.S. 11, 66 (1969).

[106]Ga. Code Ann. §15-101 (Supp. 1970).

[107]See 1 A. Shalowitz, supra note 31, at 172-73, 230-35.

[108]Convention of the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] art. 12, para. 1, 15 U.S.T. 1607, T.I.A.S. No. 5639.

[109]1959 Ga. L. 378.

[110]Wright, Jurisdiction in the Tidelands, 32 Tul. L. Rev. 175, 176 (1958).

[111] 1 F. Cas. 926, 927 (No. 397) (C. C. D. Mass. 1812).

[112] See language of the Supreme Court in United States v. California, 332 U.S. 19, 36 (1947): "As previously stated, this Court has followed and reasserted the basic doctrine of the Pollard case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

[113] United States v. California, 332 U.S. 19 (1947); accord United States v. Louisiana, 339 U.S. 699 (1950), United States v. Texas, 339 U.S. 707 (1950).

[114] 43 U.S.C. §1311(a) (1964).

[115] Id. §1301(e).

[116] Paramount rights of the federal government "for the constitutional purposes of commerce, navigation, national defense, and international affairs" were not affected by the Submerged Lands Act. United States v. Rands, 389 U.S. 121, 127 (1967).

[117] 1 A. Shalowitz, supra note 31, at 279.

[118] See Black's Law Dictionary 637 (4th ed. 1951).

[119] See 2 Blackstone, supra note 39, at 261-62.

[120] Ga. Code Ann. §85-1307 (1970).

[121] Id.

[122] See R. Kates, supra note 79, at 12.

[123] Ga. Code Ann. §85-1309 (1970).

[124] See Ga. Code Ann. §§83-115 to -117 (1970); see id. §45 146(f) (Supp. 1970) (exemption of certain wharves from permit requirements).

[125] Though the 1902 Tidelands Act provided for an extension of riparian rights adjoining tidewaters, since there was no specific grant of a right to wharf out into tidal waters, the extent of this right or privilege would remain as at common law. See West v. Baumgartner, cas. nos. 45908-13, --Ga. App. --(1971), petition for cert. filed, Sup. Ct. of Ga. (Aug. 20, 1971) (No. 26795).

[126]See supra note 42.

[127]Rights in estuarine lands and waters are dealt with as "real property" rights though it is also recognized that rights to waters are usufructuary in character. Where it is recognized that the state owning these lands and waters originally as an attribute of its sovereignty had a right to alienate such rights, these doctrines may be of particular relevance in confirming public rights to these lands and waters based on public use.

[128]See 6 R. Powell, The Law of Real Property ¶1026, at 762.12-.13 (1970).

[129]Id. at 762.13.

[130]See id. ¶934, at 361-62.

[131]Ga. Code Ann. §§85-401 to -402 (1970). This doctrine of title by prescription as to land is taken from the Roman law. "Early English common law recognized prescription only as to incorporeal rights." A. Powell, Actions at Law Respecting Titles to Land §317, at 423 (1911).

[132]Ga. Code Ann. §85-409 (1970); also see id. §85-1401.

[133]Id. §85-410.

[134]See id. §85-406; R. Powell, supra note 128, ¶1020, at 750 (1970).

[135]See A. Powell & S. Mitchell, Actions for Land §§324-33 (rev. ed. 1946).

[136]Ga. Code Ann. §85-407 (1970). For distinction between "claim of right" and written evidence of title, see A. Powell & S. Mitchell, supra note 135, §§294-95.

[137]Ga. Code Ann. §§85-403 to -404 (1970); Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 85, 3 S.E.2d 91, 94 (1939). "Actual possession, ... , is a thing evidenced by physical insignia, by the acts and conditions which attend corporeal use or occupany." A. Powell & S. Mitchell, supra note 135, §306 at 362. Occasional occupancy is not sufficient to constitute actual possession, nor is the posting of signs forbidding trespassing, or from time to time the driving away hunters on swamp land not capable of cultivation. Fitzpatrick v. Massee-Felton Lumber Co., 188 Ga. 80, 86, 3 S.E.2d 91, 94-95 (1939).

[138]House v. Palmer, 9 Ga. 497 (1851); Dyal v. McLean, 188 Ga. 229, 3 S.E. 2d 571 (1939); A. Powell & S. Mitchell, supra note 135, §353.

[139]Ga. Code Ann. §85-409 (1970). The acquisition of water rights through use is part of the law of prescriptive easements in Georgia. See Watkins v. Pepperton Cotton Mills, 162 Ga. 371, 374-76, 134 S.E. 69, 70-71 (1926). However, since in Georgia there has been recent confirmation of basic state ownership of tidal waters (West v. Baumgartner, case. nos. 45908-13, --Ga. App. --(1971) petition for cert. filed Sup. Ct. of Ga. (Aug. 20, 1971) (No. 26795)), and since also in Georgia there is no prescriptive right against the State, rights in estuarine waters based on use is relevant to the present study only as it relates to acquisition of other prescriptive rights through use.

[140]Seaboard Air Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868 (1908); Mayor and Aldermen v. Standard Fuel Supply Co., 140 Ga. 353, 78 S.E. 906 (1913). It should be noted that a prescriptive right in the public and dedication to the public may in many cases be established by the same facts.

[141]Warlick v. Rome Loan & Finance Co., 194 Ga. 419, 22 S.E.2d 61 (1942); Hogan v. Cowart, 182 Ga. 145, 184 S.E. 884 (1936).

[142]Seaboard Air Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868 (1908); see Whelchel v. Gainesville & Dahlonega Elec. Ry., 116 Ga. 431, 42 S.E. 776 (1902); A. Powell & S. Mitchell, supra note 92, §325 at 386 n. 30. Contra, City of Atlanta v. Georgia R.R. & Banking Co., 148 Ga. 635, 98 S.E. 83 (1919).

[143]Ga. Code Ann. §85-410 (1970); Savannah Beach v. Drane, 205 Ga. 14, 52 S.E. 2d 439 (1949); Hyde v. Chappell, 194 Ga. 536, 22 S.E. 2d 313 (1942).

[144]Hyde v. Chappell, 194 Ga. 536, 22 S.E. 2d 313 (1942); Shirley v. Morgan, 170 Ga. 324, 152 S.E. 831 (1930).

[145]Hillside Cotton Mills v. Ellis, 23 Ga. App. 45, 97 S.E. 459 (1918) (express dedication together with use by public constitute dedication even though period of use is less than seven years).

[146]See Mayor and Aldermen v. Standard Fuel Supply Co., 140 Ga. 353, 78 S.E. 906 (1913) (wharf property on a navigable stream was held to be "a place of quasi-public character, to which the public are invited" so that twenty-year use by the public did not amount to dedication by the

owner); Seaboard Air Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868 (1908) (non-navigable stream subject to public servitude by long use); Daniels v. Intendant and Wardens, 55 Ga. 609 (1876) (bridge considered susceptible to dedication).

[147] 2 Farnham 1361; see 2 Blackstone, supra note 39, at 14.

[148] West v. Baumgartner, cas. nos. 45908-13, --Ga. App. --(1971), petition for cert. filed Sup. Ct. of Ga. (Aug. 20, 1971) (No. 26795); 2 Farnham 1362-63.

[149] 2 Farnham 1374.

[150] §1A of the 1968 Amendment to the State Game and Fish Commission Act, 1968 Ga. L. 497, 501 [Ga. Code Ann. §45-101.1 (Supp. 1970)].

[151] §2 id. at 502 [Ga. Code Ann. §45-102 (Supp. 1970)].

[152] Ga. Code Ann. §85-1309 (1970).

[153] West v. Baumgartner, cas. nos. 45908-13, --Ga. App. --(1971), petition for cert. filed Sup. Ct. of Ga. (Aug. 20 1971) (No. 26795). (There is specific statement in the case of the public's right of fishery in tidal waters at common law; the public's right to hunt in this area is included by implication.)

[154] Id.

[155] §§66 and 88 of the 1955 State Game and Fish Commission Act, 1955 Ga. L. 483, 520, 526 [Ga. Code Ann. §§45-528, -709 (1957)].

[156] §90 id. at 526-27 [Ga. Code Ann. §45-711 (1957)].

[157] Id. at 527 [Ga. Code Ann. §45-711 (1957)].

[158] Id.

[159] See Ga. Code Ann. §§85-1307, -1309 (1970).

[160] See Ga. Code Ann. §45-907 (1957).

[161] See Ga. Code Ann. §§45-907, -910, -912 (1957).

[162] See Rice, supra note 46, at 41.

[163]58 C.J.S. Mines and Minerals §132 (1948); see 2 Blackstone, supra note 39, at 18.

[164]1 Farnham §143.

[165]§3 of the 1945 Mineral Leasing Commission Act, 1945 Ga. L. 352, 353-54 [Ga. Code Ann. §91-120 (1963)]. A Georgia Act enacted in 1885 concerning rights of discoverers of phosphate deposits would seem to be in conflict with this later 1945 Act. See 1885 Act Encouraging Search for Phosphate Deposits, 1884-85 Ga. L. 125 [Ga. Code Ann. §43-401 (1957)]. The State Mineral Leasing Commission has authority to negotiate contracts for mineral rights to all State owned lands and bottoms. §2 of the 1945 Mineral Leasing Commission Act, 1945 Ga. L. 352, 353 [Ga. Code Ann. §91-119 (1963)]. The 1885 Act provides that any person discovering phosphate deposits in the navigable streams or waters of the State or on the banks or margins of public land, upon notice of his discovery to the Secretary of State, is entitled to a ten-year exclusive right to mine this deposit. §1 of the 1885 Act Encouraging Search for Phosphate Deposits, 1884-85 Ga. L. 125-26 [Ga. Code Ann. §43-401 (1957)]. This statute in so far as it concerns State owned lands and bottoms, would seem to be repealed by implication by the 1945 Mineral Leasing Commission Act.

[166]See Ga. Code Ann. §§85-1307, -1309 (1970).

[167]Research has revealed two doctrines in this area--a general principle which contemplates inclusion of mineral rights among those rights which follow the ownership of land and a special doctrine that only specific grant of rights to minerals in public areas (here tidal areas) would operate to convey such rights. See text accompanying notes 163-64, supra.

[168]See 1 Heyman, Powers: Regulation-Legal Questions 48-49 (Report Prepared for San Francisco Bay Conservation and Development Commission, vol. 1, 1968).

[169]Such statutory regulations could be worded in terms of maintenance of certain water characteristics as degree of salinity, saturation, circulation. Address by Mark J. Hershman, Annual Meeting of Coastal States Organization, July 30, 1971.

[170]Judicial use of the term "reasonableness" to indicate constitutionality does not provide insight as to the decision in any particular case but merely indicates the terminology which is used in this process. The question is "to what extent do constitutions, as interpreted by

courts, shield private property from government control." 1 Heyman, supra note 168, at 10. A particular state court's interpretation of its role in this "balancing process" is vital in determining what regulations can be made under the police power concept. Id.

[171]See Comm'r of Natural Resources v. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965); see cases cited in 1 Heyman, supra note 168, at 81 n. 9.

[172]See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964); Halperin, Conservation, Policy, and the Role of Counsel, 23 Maine L. Rev. 119 (1971); Wilkes, Constitutional Delimmas Posed by State Policies against Marine Pollution--The Maine Example, 23 Maine L. Rev. 143 (1971); Power, More about Oysters Than You Wanted to Know, 30 Md. L. Rev. 199 (1970); Note, Regulation and Ownership of the Marshlands: The Georgia Marshlands Act, 5 Ga. L. Rev. 563 (1971).

[173]See Morreale, Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation, 3 Nat. Res. J. 1, 28-30 (1963) ("Such interference is not a taking, for the private right had from its creation been impressed with the public right." Id. at 30.); Note, Regulation and Ownership of the Marshlands: The Georgia Marshlands Act, 5 Ga. L. Rev. 563, 578-79 (1971).

[174]Coastal Marshlands Protection Act of 1970, Ga. Code Ann. §§45-136 to -147 (Supp. 1970).

[175]Id. §45-140(a).

[176]Id. §45-140(e). Recently a permit was denied for filling of marshland for industrial purposes. Atlanta Journal, July 17, 1971, at 3B, col. 1 (home ed.).

[177]Ga. Code Ann. §45-146 (Supp. 1970).

[178]Ga. Code Ann. §43-1301 (Supp. 1970), amending 1967 Ga. L. 12, 13. An excellent recent study for the Conservation Foundation provides needed "ecological guidelines" for the planning of recreational development of the Georgia Coast. The Georgia Coast: Issues and Options for Recreation (1971) (The Conservation Foundation, Washington, D.C.).

[179]See Ga. Code Ann. §§40-2901, -2917, 69-1201 (Supp. 1970).

[180]Id. Ga. Code Ann. §§45-114 (1957), 43-124 (Supp. 1970), 43-606a (Supp. 1970), 98-204, -205 (1968); 1947 Ga. L. 1480, 1482-85; Ga. Code Ann. §§69-1501, -1504 (Supp. 1970).

[181]See Ga. Code Ann. §45-140(a) (Supp. 1970).

[182]See id. §69-1501(e).

[183]See Ga. Code Ann. §§98-205 (1968), 45-146(b) (Supp. 1970). An Act, enacted in 1971 to amend the Georgia Ports Authority Act authorizes the Governor to convey to that Authority approximately sixty-eight acres of marshland for port development purposes. 1971 Ga. L. 910.

[184]D. Ramsay, History of South Carolina 14-31 (1858). An earlier grant in 1630 to Sir Robert Heath covering all land south of Virginia was declared void because of failure to make settlement and fulfill its conditions. E. McCrady, The History of South Carolina under the Proprietary Government 1670-1719, 54-56, 70 (1897).

[185]1 Statutes at Large of South Carolina 22, 24 (Cooper ed. 1836).

[186]Id. 31, 34.

[187]2 Id. 401, 413-14, §V (Cooper ed. 1837).

[188]D. Ramsay, supra note 184, at 53-69. Concerning the transition to the status of a royal province, it is interesting to note that although a royal governor was appointed by the Crown in 1720 and the responsibilities of royal government were assumed, title to the soil remained in the Lords Proprietors under the grant from Charles II until agreement was made with Georgia II to purchase the interest and title of seven of the proprietors. Sir John Carteret retained his rights to one-eighth part. E. McCrady, The History of South Carolina under the Royal Government 1719-1776, at 4-5, 32 (1901). This agreement was confirmed by An Act for Establishing an Agreement with Seven of the Lords Proprietors of Carolina, 2 Geo. 2, c. 34 (1729), 1 Statutes at Large of South Carolina 60 (Cooper ed. 1836). Sir John Carteret's interest in South Carolina was released by an indenture in 1744. E. McCrady, The History of South Carolina under the Proprietary Government 1670-1719, at 679-80 (1897).

[189]E. McCrady, The History of South Carolina Under the Royal Government 1719-1776, at 25 (1901).

[190] D. Ramsey, supra note 184, at 53.

[191] 1 Blackstone, supra note 39, at 108.

[192] Shively v. Bowlby, 152 U.S. 1, 14-15 (1894); State v. Pinckney, 22 S.C. 484, 502 (1885).

[193] See S.C. Const. art. XXIX (1776); id. art. XXXIV (1778); id. art. VII (1790).

[194] See, e.g., State v. Charleston Bridge Co., 113 S.C. 116, 101 S.E. 657 (1919); O'Hagen v. Fraternal Aid Union, 144 S.C. 84, 141 S.E. 893 (1928).

[195] 1 Statutes at Large of South Carolina 22, 27, 31, 37 (Cooper ed. 1836).

[196] 3 id. 289, 290, §I (Cooper ed. 1838).

[197] S.C. Code Ann. §§57-52 to -53 (1962).

[198] Id. §57-57 (1962). This Code section was originally part of an Act of 1787, 5 Statutes at Large of South Carolina 38, 40 §VIII (Cooper ed. 1839).

[199] See 4 Statutes at Large of South Carolina 590 (Cooper ed. 1838).

[200] See id. at 593, §XV.

[201] 7 Statutes at Large of South Carolina 151, §IV (McCord ed. 1840). The statute provides:

> That all vacant land not legally vested in individuals, in the harbor of Charleston, covered by water, be, and the same is hereby, vested in the city of Charleston for public purposes, but not to be so used or disposed of as to obstruct or injure the navigation of said harbor. Id.

It should be noted that included in this Act is a section limiting the use of such privately held water lots. These water lots could not be used "in any manner" that was "injurious to the health, comfort or convenience of the citizens." Id. §V.

[202] Id. at 627, §I.

[203]See, e.g., Act of 1787, 5 Statutes at Large of South Carolina 24 (Cooper ed. 1839), Act of 1788, 5 Statutes at Large of South Carolina 57 (Cooper ed. 1839); Act of 1789, 5 Statutes at Large of South Carolina 129 (Cooper ed. 1839). In 1815 this early type of tax was replaced by an Act which reclassified some categories. 6 Statutes at Large of South Carolina 7 §I (McCord ed. 1839).

[204]7 Statutes at Large of South Carolina 60, 61-62, §§III, V (McCord ed. 1840); id. 65, 69-70, §XX.

[205]Id. 65, 70, §XXI.

[206]5 id. 38, 39, §IV (Cooper ed. 1839).

[207]Id. §VI.

[208]7 id. 65, 69-70, §§XX, XXI (McCord ed. 1840).

[209]5 id. 38, 39, §§IV, VI (Cooper ed. 1839); see, e.g., Shepard's Point Land Co. v. Atl. Hotel, 134 N.C. 397, 46 S.E. 748 (1904); Atl. & N.C.R.R. v. Way, 172 N.C. 774, 90 S.E. 937 (1916).

[210]See 7 Statutes at Large of South Carolina 60, 61-62, §§III, V (McCord ed. 1840); id. 65, 69-70, §§XX, XXI; id. 151, §V.

[211]S.C. Const. art. XXIX (1776); id. art. XXXIV (1778); id. art. VII (1790). It should be noted that the South Carolina Supreme Court has declared that the Constitutions of 1776 and 1778 are simply Acts of the General Assembly of South Carolina which that body could alter at will since they were not ratified by the public. Thomas v. Daniel, 2 McCord 354 (S.C. 1823).

[212]S.C. Const. art. III, §19, art. I, §40 (1868).

[213]Id. art. III, §31 (1895).

[214]State v. S.C. Phosphate Co. (alias, Oak Point Mines), 22 S.C. 593, 600-601 (1875). The position of this case as binding precedent has been questioned both because it is a Circuit Court opinion and because there was some irregularity in reporting the case. Clineburg & Krahmer, The Law Pertaining to Estuarine Lands in South Carolina, 23 S.C.L. Rev. 7, 19-20 (1971).

[215]State v. S.C. Phosphate Co., 22 S.C. 593, 600-601 (1875).

[216] Id.

[217] Id. at 601-02.

[218] 22 S.C. 50, 84 (1884).

[219] Id. at 83.

[220] Id. at 75-77.

[221] Id. at 79-80. The confusion found in the common law as to the meaning of the term "tidal" and the assumption that prevailed for some time that it was synonymous with "navigable," has been developed earlier in this monograph. See note 31 supra; Clineburg and Krahmer, The Law Pertaining to Estuarine Lands in South Carolina, 23 S. C. L. Rev. 7, 17-18 (1971).

[222] State v. Pac. Guano Co., 22 S.C. 50, 80 (1884).

[223] 22 S.C. 484 (1884).

[224] Id. at 507.

[225] 42 S.C. 138, 19 S.C. 963 (1894). Chisolm v. Caines, 67 F. 285 (C.C.D. S.C. 1894), rejected the Farmers Mining test of navigable capacity, finding that to be "navigable," a stream must be accessible to the public and must have a public terminus at each end. This opinion of a lower federal court would not be controlling in the determination by South Carolina's courts of its substantive law.

[226] Heyward v. Farmers Mining Co., 42 S.C. 138, 157, 19 S.E. 963, 973 (1894).

[227] Id.

[228] Illinois Central R.R. v. Illinois, 146 U.S. 387, 454 (1892) quoted in Heyward v. Farmers Mining Co., 42 S.C. 138, 157, 19 S.E. 963, 973 (1894).

[229] 60 S.C. 559, 39 S.E. 188 (1901).

[230] Id. at 567, 39 S.E. at 191.

[231] Cape Romaine Land & Imp. Co. v. Ga.-Car. Canning Co., 148 S.C. 428, 146 S.E. 434 (1928). Much has been written about this case. See Horlbeck, Ttitles to Marshlands in South Carolina, 14 S.C. L.Q. 288 (1962); Logan & Williams, Tidelands in South Carolina: A Study in the Law of Real Property, 15 S.C.L. Rev. 657 (1963); Clineburg & Krahmer, The Law Pertaining to Estuarine Lands in South Carolina, 23 S.C.L. Rev. 7 (1971).

[232] Cape Romaine Land & Imp. Co. v. Ga.-Car. Canning Co., 148 S.C. 428, 434, 146 S.E. 434, 436 (1928).

[233] Id.

[234] Rice Hope Plantation v. S.C. Pub. Serv. Auth., 216 S.C. 500, 530, 59 S.E.2d 132, 145 (1950). A more recent case concerning ownership of foreshore areas of tidal navigable streams, Lane v. McEachern, 251 S.C. 272, 162 S.E.2d 174 (1968), does not clarify the circumstances under which private ownership of the foreshore area would be recognized. The grant from George II under consideration in this case, specified that a tidal river was the boundary and the other lines of the property were those appearing on a plat. The State stipulated that a specified swamp was included within the boundaries as described in the plat in question. This stipulation, the court ruled, had the effect of including the foreshore area within the tract granted by the King, and consequently the court did not find it necessary to consider the rule of construction contended for by the State, that a grant having tidal boundaries if it is to give title to low-water mark, must have specific words providing for that low-water mark as the boundary.

[235] Alston v. Limehouse, 60 S.C. 559, 566, 39 S.E. 188, 190 (1901); Cape Romaine Land & Imp. Co. v. Ga.-Car. Canning Co., 148 S.C. 428, 435, 146 S.E. 434, 437 (1928). The special rules governing alienation of navigable tidal beds are set forth in the Farmers Mining case. See text accompanying notes 226-28 supra.

[236] See Cape Romaine Land & Imp. Co. v. Ga.-Car. Canning Co., 148 S.C. 428, 444-45, 146 S.E. 434, 440 (1928) (dissenting opinion).

[237] 22 S.C. 50, 79 (1884).

[238] 42 S.C. 138, 156-57, 19 S.E. 963, 973 (1894).

[239] Alston v. Limehouse, 60 S.C. 559, 39 S.E. 188 (1901).

[240]Cape Romaine Land & Imp. Co. v. Ga.-Car. Canning Co., 148 S.C. 428, 434-35, 146 S.E. 434, 436-37 (1928).

[241]Gadsden v. West Shore Inv. Co., 99 S.C. 172, 82 S.E. 1052 (1914) (grant from King George II was stipulated).

[242]Nathans v. Steinmeyer, 57 S.C. 386, 35 S.E. 733 (1900) (defendant interposed, as a defense to an action to foreclose a mortgage on real estate, partial failure of consideration due to paramount outstanding title in the City).

[243]West End Dev. Co. v. Thomas, 92 S.C. 229, 75 S.E. 450 (1912).

[244]7 Statutes at Large of South Carolina 87, 88-89, §V (McCord ed. 1840).

[245]West End Dev. Co. v. Thomas, 92 S.C. 229, 234, 75 S.E. 450, 452 (1912).

[246]123 S.C. 272, 115 S.E. 596 (1923).

[247]7 Statutes at Large of South Carolina 97, 98-99, §§IV-V (McCord ed. 1840).

[248]Haesloop v. City Council, 123 S.C. 272, 278, 115 S.E. 596, 598 (1923).

[249]Id. at 282, 115 S.E. at 600.

[250]215 S.C. 390, 393, 55 S.E.2d 344, 345 (1949).

[251]Id. at 401, 55 S.E. at 349.

[252]123 S.C. 272, 278, 115 S.E. 596, 598 (1923).

[253]7 Statutes at Large of South Carolina 87, 88-89, §V (McCord ed. 1840).

[254]Id. at 97, 99, §V.

[255]Act of Dec. 1836, 7 Statutes at Large of South Carolina 151, §IV (McCord ed. 1840), now codified as S.C. Code Ann. §47-1541 (1962); Act of March, 1930, 36 Statutes at Large of South Carolina 1270, §1 (1930), now codified as S.C. Code Ann. §47-1542 (1962); Act of Feb., 1911, 27 Statutes at Large of South Carolina 315, 316, §1 (1911); Act of March, 1930, 36 Statutes at Large of South Carolina 1111, 1112, §1 (1930).

[256] The upland boundary of this tidal area and so of trust area has been judicially defined in South Carolina as "high-water mark," that "'line on the shore which is reached by the limit of the flux of the usual tide'; that is, the high mark made on the shore as 'the tide ebbs and flows twice in each lunar day,' and not the point reached at new or full moon nor when there is an intervening disturbance such as a storm or earthquake." Cape Romaine Land & Imp. Co. v. Ga.-Car. Canning Co., (148 S. C. 436-37, 146 S. E. 437); for similar statutory definition see 47 Statutes at Large of South Carolina 787, §1(c) (1951).

[257] See supra note 227.

[258] 33 Statutes at Large of South Carolina 1016, 1017, §1 (1924), now codified as S. C. Code Ann. §28-754 (1962).

[259] See [1956-1957] S. C. Atty Gen. Ann. Rep. 291. The Attorney General concludes that "the marsh lands, under the law as it now stands, are not subject to sale by the Budget and Control Board and probably not to general sale by the Legislature." Id. at 297.

[260] See 56 Statutes at Large of South Carolina 1074 (1969). That portion of the tidelands granted which was not used by the City for street or parking purposes was to be leased "in a manner to retain and protect the public interest therein." Id., §2.

[261] 33 Statutes at Large of South Carolina 1016, 1017, §1 (1924), now codified as S. C. Code Ann. §28-754 (1962).

[262] S. C. Code Ann. §28-752(4) (1962).

[263] Id. §28-811; see [1963-1964] S. C. Att'y Gen. Ann. Rep. 36.

[264] See text accompanying notes 27, 36-42.

[265] Note, The Riparian Rights Doctrine in South Carolina, 21 S. C. L. Rev. 757, 758-59 (1969).

[266] White v. Whitney Mfg. Co., 60 S. C. 254, 38 S. E. 456 (1901); see U.S. v. 531.13 Acres of Land, 244 F. Supp. 895 (W. D. S. C. 1965), rev'd and remanded on other grounds, 366 F. 2d 915 (4th Cir. 1966).

[267] White v. Whitney Mfg. Co., 60 S. C. 254, 265-69, 38 S. E. 456, 460-61 (1901); see Note, The Riparian Rights Doctrine in South Carolina, 21 S. C. L. Rev. 757, 762-64 (1969).

[268]Jones v. Seaboard Air Line Ry. Co., 67 S.C. 181, 45 S.E. 188 (1903).

[269]See Wheeler v. Wheeler, 111 S.C. 87, 96 S.E. 714 (1918).

[270]S.C. Code Ann. §70-1 (1962).

[271]Act of Dec. 1853, 12 Statutes at Large of South Carolina 305, §1 (1853); see Heyward v. Farmers Mining Co., 42 S.C. 138, 19 S.E. 963 (1894); Alston v. Limehouse, 60 S.C. 559, 39 S.E. 188 (1901).

[272]42 S.C. 138, 151, 19 S.E. 963, 971 (1894); cf. Alston v. Limehouse, 60 S.C. 559, 39 S.E. 188 (1901).

[273]See Coakley v. Tidewater Const. Corp., 194 S.C. 284, 9 S.E.2d 724 (1940); Nuckolls v. Great A & P Tea Co., 192 S.C. 156, 5 S.E.2d 862 (1939).

[274]See, e.g., S.C. Code Ann. §70-411, -471, -491 (1962); see also Hill, Limitation on Diversion from the Watershed: Riparian Roadblock to Beneficial Use, 23 S.C.L. Rev. 43, 59-61 (1971).

[275]43 U.S.C. §1312 (1964).

[276]Id. §1301(c).

[277]1 A. Shalowitz, Shore and Sea Boundaries 155 (1962).

[278]See notes 93-96 supra, and accompanying text.

[279]See text accompanying notes 99-105, 107-108, supra.

[280]56 Statutes at Large of South Carolina 2051, 2492 (1970).

[281]Id. It should be noted that in the amendment adopted April 28, 1970, the qualifying section of the amendment conditions effectiveness on Congressional or State ratification. Id. 2492 §2.

[282]See note 88 supra. South Carolina is one of the Atlantic Coast states claiming in pending litigation rights in the marginal sea beyond the three mile limit independently of the Submerged Lands Act. Lewis, A Capsule History and the Present Status of the Tidelands Controversy, 3 Nat. Res. Law. 620, 629 (1970).

[283] The demarcation of this "coast line" is of importance to conservationists since state ownership is assured below this "coast line" as of the 1953 date.

[284] Special legislation affecting such alienation would need to comply with the requirements set forth in the Farmers Mining case. See text accompanying note 256 supra.

[285] See text accompanying notes 110-113 supra.

[286] See notes 115-116 supra, and accompanying text.

[287] See S. C. Code Ann. §28-754 (1962).

[288] See 2 Blackstone, supra note 39, at 261-62.

[289] 136 S. C. 525, 134 S. E. 497 (1926).

[290] S. C. Code Ann. §51-293.10 (1962).

[291] 8 Rich. 301, 64 Am. Dec. 755 (S. C. 1855).

[292] [1966-1967] S. C. Att'y Gen. Ann. Rep. 32.

[293] See 2 Blackstone, supra note 39, at 261.

[294] [1966-1967] S. C. Att'y Gen. Ann. Rep. 32.

[295] See, e.g., Stone, 1 Clark 273.

[296] See S. C. Code Ann. §§70-163 (1962), 54-431 (Supp. 1970).

[297] See D. Means, South Carolina Lakes and Ponds in C. Randall and D. Means, Legal Aspects of Water Use and Control in South Carolina 21 (1970); see also State v. Young 30 S. C. 399, 9 S. E. 355(1889).

[298] See note 42 supra, and accompanying text.

[299] [1956-1957] S. C. Att'y Gen. Ann. Rep. 260.

[300] 6 R. Powell, The Law of Real Property ¶1012, at 709 (1970).

[301] 22 S. C. 50 (1884).

[302] Id. at 84.

[303] Cape Romaine Land & Imp. Co. v. Ga.-Car. Canning Co., 148 S.C. 428, 438, 146 S.E. 434, 438 (1928); State v. Pac. Guano Co., 22 S.C. 50, 85 (1884).

[304] S.C. Code Ann. §10-121 (1962).

[305] Haithcock v. Haithcock, 123 S.C. 61, 115 S.E. 727 (1923); see Logan & Williams, Tidelands in South Carolina: A Study in the Law of Real Property, 15 S.C.L. Rev. 657, 676 (1963).

[306] See Lynah v. United States, 107 F. 121 (C.C.D. S.C. 1901), aff'd, 188 U.S. 445 (1903), where rice cultivation was considered a sufficient act to constitute ownership of foreshore area. See also Barker v. Deignan, 25 S.C. 252 (1886), where floating rafts and lumber and stacking same to ground under water was considered insufficient to indicate adverse continuous possession of water lot.

[307] See Intendant and Wardens v. Charleston & W.C. Ry. Co., 136 S.C. 525, 134 S.E. 497 (1926); 6 R. Powell, The Law of Real Property, ¶1020, at 750-52.

[308] See S.C. Code Ann. §§10-2421 to -2425, -129 (1962).

[309] Mullis v. Winchester, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961).

[310] S.C. Code Ann. §§10-2422 to-2425 (1962); see Note, Constructive Adverse Possession under Color of Title in South Carolina, 10 S.C.L.Q. 279 (1958); Barker v. Deignan, 25 S.C. 252 (1886) (an action for trespass and damages to plaintiff's land wherein defendant claimed ownership of a Charleston water lot on the basis of adverse possession and the Court declared that since defendant presented no color of title, the extent of his claim was necessarily limited to the area actually occupied.)

[311] S.C. Code Ann. §10-129 (1962).

[312] Note, Effect of Disability of Landowner with Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grant, and Prescriptive Right in South Carolina, 10 S.C.L.Q. 292, 302 (1958).

[313] See id. at 297-301.

[314]S. C. Const. art. 3, §31.

[315][1958-1959] S. C. Att'y Gen. Ann. Rep. 150, 153.

[316]Id.; [1958-1959] S. C. Att'y Gen. Ann. Rep. 154. It should be noted that the legislature had in the past confirmed tideland grants to individuals claiming under adverse possession based upon payment of taxes. See, e.g., 50 Statutes at Large of South Carolina 1032 (1957); 49 id. 856 (1955).

[317]Williamson v. Abbott, 107 S. C. 397, 400, 93 S. E. 15-16 (1917).

[318]Id. at 400, 93 S. E. at 16; Jordan v. Lang, 22 S. C. 159 (1885).

[319]Williamson v. Abbott, 107 S. C. 397, 400, 93 S. E. 15, 16 (1917).

[320]Jordan v. Lang, 22 S. C. 159 (1885).

[321]Heyward v. Chisolm, 11 Rich. 253 (S. C. 1858).

[322]Derby Heights, Inc. v. Gantt Water and Sewer Dist., 237 S. C. 144, 149, 116 S. E. 2d 13, 16 (1960).

[323]Safety Bldg. and Loan Co. v. Lyles, 131 S. C. 542, 128 S. C. 724 (1925).

[324]Chafee v. City of Aiken, 57 S. C. 507, 35 S. E. 800 (1900).

[325]Derby Heights, Inc. v. Gantt Water and Sewer Dist., 237 S. C. 144, 150, 116 S. E. 2d 13, 16 (1960); accord, Town of Estill v. Clarke, 179 S. C. 359, 362, 184 S. E. 89, 90 (1936).

[326]Grady v. City of Greenville, 129 S. C. 89, 123 S. E. 494 (1924).

[327]Knoerr v. Crews, 246 S. C. 174, 143 S. E. 2d 120 (1965).

[328]S. C. Code Ann. §28-3 (1962).

[329][1967-1968] S. C. Att'y Gen. Ann. Rep. 305.

[330]Id.

[331]4 Rich. 68, 86-87 (S. C. 1851).

[332]S. C. Code Ann. §28-754 (1962).

[333][1961-1962] S. C. Att'y Gen. Ann. Rep. 205.

[334]See text accompanying notes 264-69, 285-87 supra.

[335]See text accompanying notes 270-73 supra.

[336]D. Rice, Estuarine Lands of North Carolina: Legal Aspects of Ownership, Use and Control 39 (Inst. of Gov't Univ. of N. C. 1968).

[337]S. C. Code Ann. §28-791 (1962).

[338]South Carolina Water Resources Commission, South Carolina Tidelands Report 111 (2d rev. printing 1970).

[339]As pointed out in the Georgia section of this report, there is authority for an exception to the general rule. See note 164 supra.

[340]State v. Pinckney, 22 S. C. 484 (1884); Heyward v. Farmers Mining Co., 42 S. C. 138, 19 S. E. 963 (1894).

[341]See note 164 supra.

[342]S. C. Code Ann. §1-793 (1962). This statute was originally enacted in 1870. 14 Statutes at Large of South Carolina 388, §2 (1870).

[343][1965-1966] S. C. Att'y Gen. Ann. Rep. 9; [1956-1957] S. C. Att'y Gen. Ann. Rep. 291.

[344]See discussion accompanying notes 168-73 supra.

[345]Bills concerning tidelands are currently pending before the South Carolina legislature. See South Carolina H. 1045 (1971); South Carolina S. 221 (1971).

[346]South Carolina Water Resources Commission, South Carolina Tidelands Report 1 (2d rev. printing 1970); S. C. Code Ann. §70-22 (Supp. 1970). While originally designated South Carolina Water Resources Committee, a 1969 Amendment changed "Committee" to "Commission." 56 Statutes at Large of South Carolina 72 (1969).

[347]See, e.g., South Carolina Water Resources Commission, South Carolina Tidelands Report 4-7 (2d rev. printing 1970).

[348]S. C. Code Ann. §28-107 (1962).

[349]Ludwigson, Managing the Environment in the Coastal Zone, 1 Environment Rep.--Monograph 3, at 12 (1970).

[350]S. C. Code Ann. §28-159 (1962).

[351]Id. §§54-1, -11 to -15, -17, -51 to -53.

[352]Id. §§59-1, -3, -5.

[353]Id. §54-101.

[354]Id. §§59-561 to -564.

[355]Id. §§18-101 to -110, -201 to -333, -401 to -638.

[356]Id. §§63-141 to -153 (Supp. 1970).

[357]Id. §§63-501 to -505.